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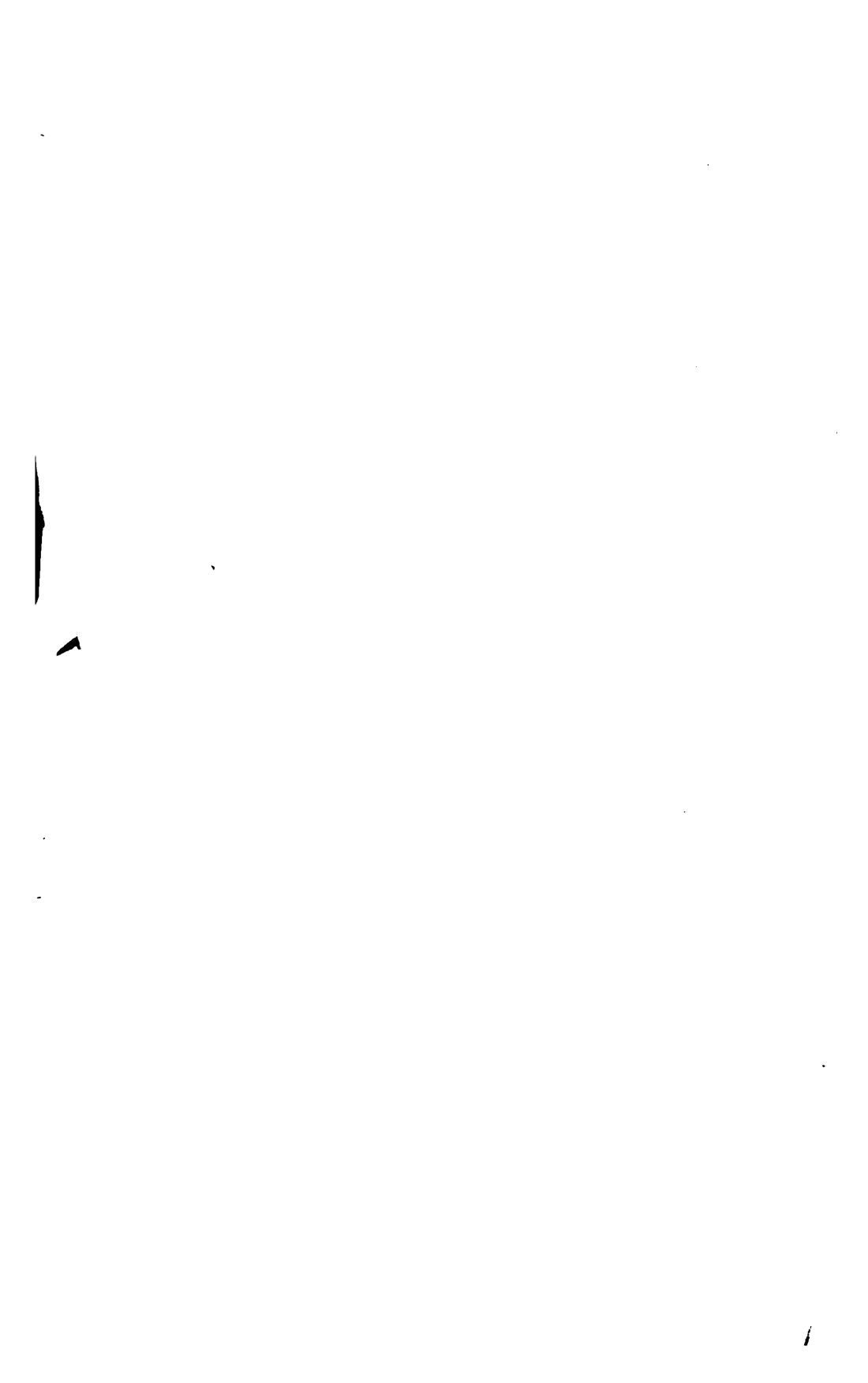
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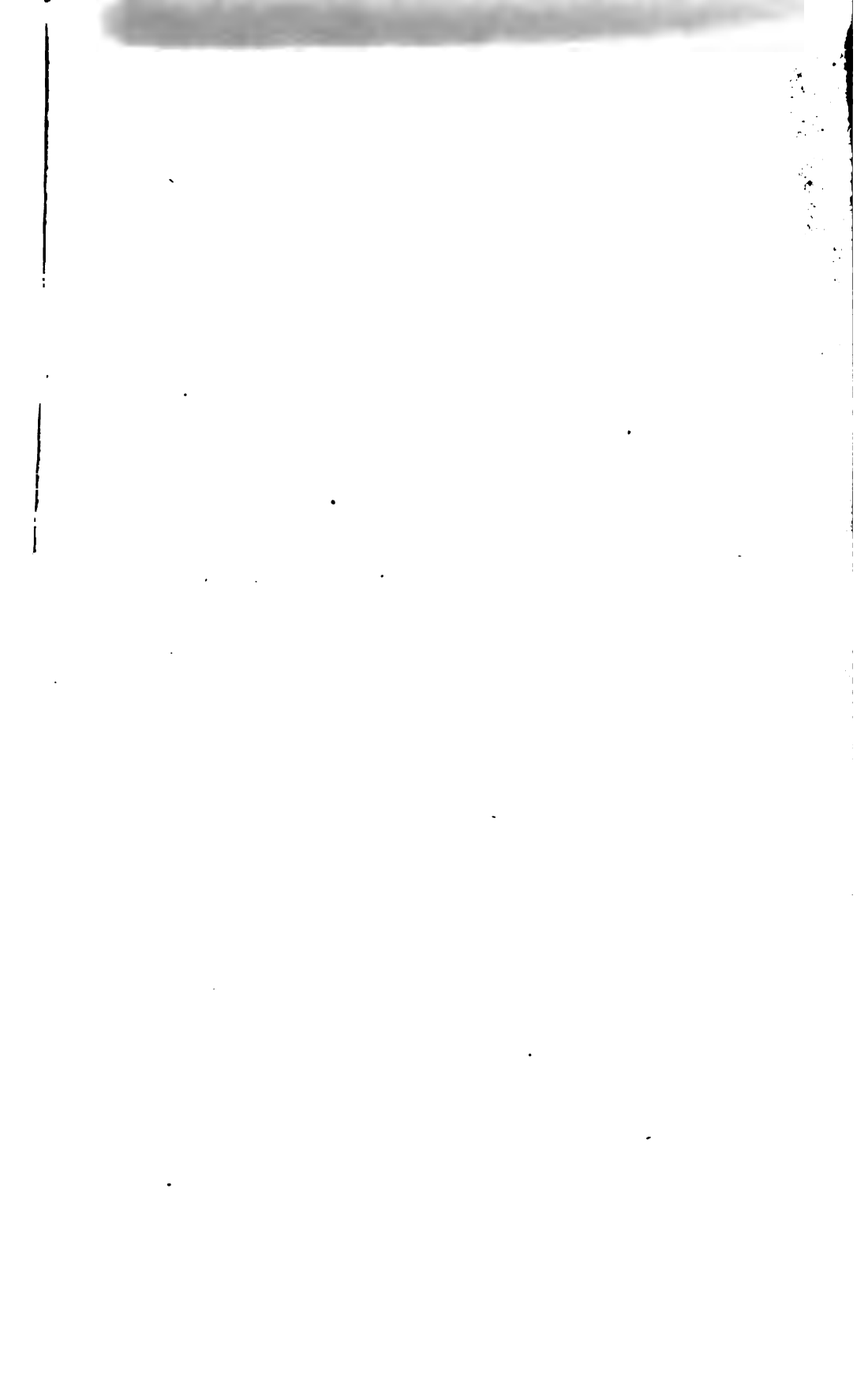
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AMERICAN
CONSTITUTIONAL LAW.

BY

J. I. CLARK HARE, LL.D.

IN TWO VOLUMES.

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AMERICAN CONSTITUTIONAL LAW.

LECTURE XXIX.

A Constitutional Provision that Charters shall be revocable, binding on the Legislature, and precludes an Absolute Grant. — The Effect of such a Declaration, when made legislatively, on Subsequent Charters. — Question in the Last-Named Case one of Intention. — Charter must not be repealed injuriously, or in a way to impair Rights acquired while it was in force. — A Legislative Grant cannot be annulled for Bribery, nor as against a *bona fide* Purchaser on the Ground of Fraud. — When the Language admits of two Interpretations, it should be construed favorably to the Public. — No Sovereign Right or Power will pass irrevocably, unless the Intention is clear. — The Right to act as a Body Corporate or to be exempt from Taxation, confined to the Original Grantees, and insusceptible of Transfer unless the Charter clearly expresses an Opposite Design. — The Franchise or Exemption may pass by a Judicial or Private Sale where the Right of Transfer is conferred by the Charter or where that operates as a Contract with the Purchaser.

THE constitutional prohibition was intended as a check on retroactive legislation, and does not embrace future contracts; and hence when a statute or the Constitution of a State provides that charters shall be revocable, a subsequent act of incorporation will be subject to the condition, and may be repealed without impairing any obligation which it is incumbent on the State to observe. There is under these circumstances no contract, but simply a statutory grant, which may be repealed by the same or any succeeding legislature.¹ In the *Iron City Bank v. Pittsburgh*,² the charter under which the plaintiffs claimed, provided that the bank should only be taxed for State purposes, and the question was whether it could be taxed for city purposes. The court held that the

¹ *The Monongahela Navigation Co. v. Coon*, 6 Pa. 379; *The Pennsylvania R. R. Co. v. Duncan*, 111 Pa. 352; *Birmingham v. Railroad Co.*, 79 Ala. 465.

² 37 Pa. 341.

tax was clearly valid, because the Constitution of Pennsylvania, as amended in 1838, declared that every charter giving banking or discounting privileges should contain a clause authorizing the legislature to alter, revoke, or annul the same whenever it was in their opinion injurious to the Commonwealth. Although no such clause was inserted in the act incorporating the Iron City Bank, it referred to the general banking law, which conformed to the constitutional requirement. A contract growing out of the acceptance of a charter with banking and discounting privileges was moreover necessarily subordinate to the organic law and subject to an implied power of revocation which might be exercised for any sufficient cause.

In the *Railroad Co. v. Gaines*,¹ a proviso in the Constitution of Tennessee that "all taxation shall be equal and uniform," was held on like grounds to preclude the legislature from exempting the plaintiffs in error from their share of the public burdens, and thereby occasioning the inequality which the Constitution meant to avoid. These decisions are simply an application of Mr. Webster's argument in the *Dartmouth College Case*, that the Constitution is as much a part of every statute as if it were set forth in the preamble, and that no one who claims under a legislative grant or contract can allege that he is ignorant of the organic law, or assert any right which it forbids. We may none the less infer that while the people of a State may inhibit the legislature from granting any right or privilege that will be beyond legislative control, the reservation of a power to alter or annul private contracts would presumably be invalid, as an attempt to evade the plain intent of the Federal Constitution and bring the entire field of contracts within the reach of retroactive legislation.²

In these instances the power of revocation was reserved in the organic law, and therefore necessarily inherent in every other; but a legislative declaration that all future charters shall be subject to modification or repeal, will enter into and qualify every subsequent act of incorporation which does not

¹ 97 U. S. 697.

² See *Miller v. The State*, 15 Wallace, 478.

clearly indicate a different design.¹ The question, nevertheless, in such cases is, What did the legislature intend? And if their purpose appears to have been to disregard the prior statute and enter into an irrevocable contract, the case will fall within the well-known rule, *Leges posteriores priores contrarias abrogant*.² An enactment that all charters of incorporation thereafter granted may be altered, amended, or repealed by the legislature, does not necessarily apply to supplements to a pre-existing charter, nor will a clause which declares that "this supplement, and the charter to which it is a supplement, may be altered or amended by the legislature," apply to a contract with the corporation made in a supplement thereafter passed.³ Such statutory reservations of the right of repeal, unlike similar constitutional provisions, do not bind succeeding legislatures or preclude them from making an indefeasible contract. The question therefore is not as to the interpretation of the former statute, but was the latter meant to be irrevocable; and if such appears to have been the legislative intent, it should be upheld. In *New Jersey v. Yard* the statutory grant under consideration was held not to admit of such an implied qualification, because (1) it was a settlement or compromise of an existing controversy and for a valuable consideration; (2) the contract had been reduced formally to writing, in accordance with a legislative requirement; (3) the terms of the contract, that "this tax shall be in lieu of all other taxation or imposition whatsoever by or under the authority of this State or any law thereof," implied, in view of the whole transaction, that it was to be irrevocable.⁴

The presumption that a general law forbidding exemptions from taxation, or providing that charters shall be subject to repeal or alteration, qualifies subsequent statutory grants, is nevertheless one which should not lightly be disregarded,

¹ *Tomlinson v. Jessup*, 15 Wallace, 454; *Miller v. The State*, 15 Id. 478; *Atlantic & Gulf R. R. Co. v. Georgia*, 98 U. S. 359; *Shields v. Ohio*, 95 Id. 319.

² *New Jersey v. Yard*, 95 U. S. 104.

³ *New Jersey v. Yard*, 95 U. S. 104.

⁴ *New Jersey v. Yard*, 95 U. S. 104.

and will prevail unless distinctly excluded by the words or tenor of the instrument which is alleged to be exempt from their operation.¹

A declaration in an organic or general law that such charters as shall be thereafter conferred may be modified or revoked, does not authorize the abrogation of rights of property acquired under the operation of the charter while still in force, and such a deprivation would, on the contrary, be a taking without due process of law, and as such invalid.²

Agreeably to the language held in some instances, a charter cannot be repealed arbitrarily without cause assigned, or on manifestly insufficient grounds, even when the power of revocation is reserved in terms which might seem to leave the company at the mercy of the legislature.³ And in the case last cited such was said to be the rule, although the words of the Constitution were that "the legislature shall have power to revoke or annul any charter . . . whenever in their opinion it may be injurious to the citizens of the Commonwealth, in such manner, however, that no injustice shall be done to the corporators." Agreeably to this decision, "the power of the legislature over grants and contracts is not, even when reserved in terms, like the power of the English Parliament. It corresponds more properly to that of the English Crown, as to which it is certainly the established rule that the king cannot derogate from his own grant; and when an express power is reserved in a certain event or upon certain conditions, it must be proved affirmatively that the event has occurred or the conditions have been fulfilled.⁴ The legislature is not the final judge whether the *casus fœderis* upon which the authority to repeal depends has occurred."

¹ Greenwood v. The Freight Co., 105 U. S. 13.

² See the Sinking-Fund Cases, 99 U. S. 718; Lothrop v. Stedman, 41 Conn. 583; Orr v. Backen County, 81 Ky. 593.

³ The Sinking-Fund Cases, 99 U. S. 718; Flint Plank Road Co. v. Woodhull, 25 Mich. 99; Shields v. Ohio, 95 U. S. 324; The Commonwealth v. The Pittsburg & Connellsville R. R. Co., 58 Pa. 26, 46.

⁴ The Eastern Archipelago Co. v. Queen, 2 Ex. B. 856; Crease v. Babcock, 23 Pickering, 334; The Commonwealth v. Essex Co., 13 Gray, 239; The Erie R. R. Co. v. Northwestern R. R. Co., 26 Pa. 287.

Agreeably to the Louisiana Code of 1825, "corporations may be dissolved when the legislature deem it expedient for the public interest, provided that when an act of incorporation imports a contract, on the faith of which individuals have advanced money or engaged their property, it cannot be repealed without providing for the reimbursement of the advances, or making full indemnity to such individuals." A charitable institution was incorporated subsequently to this enactment, with a stipulation that it should be perpetually exempt from taxation, and received large donations in aid of its beneficent design; and it was held that the exemption could not be abrogated by an amendment to the State Constitution without an indemnity for the sums so advanced, which, as the charter had not been revoked, would be payable to the corporation and constitute an offset to the tax. In *Tucker v. Ferguson*,¹ and *The West Wisconsin R. R. Co. v. The Supervisors*,² which were relied on as sustaining the right of revocation, the exemption was purely gratuitous, and formed no part of the act of incorporation; while in the case in hand it was embodied in the charter and held forth as an inducement for its acceptance by the incorporators and to third persons to contribute the necessary funds. It did not matter whether the gifts were before or after the amendment, because all the corporate property, present or future, was to be exempt.³ It results from this decision that a legislative assurance or stipulation which is manifestly intended as a contract or to influence the conduct of third persons who have purchased stock or made donations on the faith of the expectation so created, will be within the constitutional safeguard, notwithstanding a previous enactment that every such grant shall be revocable.⁴

The decisions on this head were reviewed by the Supreme Court in giving judgment in the Sinking-Fund Cases.⁵ It

¹ 22 Wallace, 527.

² 93 U. S. 595.

³ *The Asylum v. New Orleans*, 105 U. S. 362.

⁴ See *Miller v. The State*, 15 Wallace, 478, 499.

⁵ 99 U. S. 718.

was there said: "In granting the charter, Congress not only retained but gave special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but as was said by this court through Mr. Justice Clifford in *Miller v. The State*,¹ 'It may safely be affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs so as to protect the rights of stockholders and of creditors, and for the proper distribution of its assets,' and again in *Holyoke Co. v. Lyman*,² 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice Field, also speaking for the court, was even more explicit when, in *Tomlinson v. Jessup*,³ he said: 'The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State;' and again, as late as *Railroad Co. v. Maine*,⁴ "by the reservation . . . the State retained the power to alter it [the charter] in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges, and immunities.' Mr. Justice Swaine, in *Shields v. Ohio*,⁵ says, by way of limitation, 'the alterations must be reasonable, they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.'"⁶

¹ 15 Wallace, 498.

⁴ 96 U. S. 510.

² 15 Wallace, 519.

⁵ 95 U. S. 324.

³ 15 Wallace, 459.

⁶ See *Zabriskie v. The Railroad Co.*, 18 N. J. Eq. 178; *Ames v. The Railroad Co.*, 21 Minn. 255.

The weight of authority is that when there are no qualifying words, and the power of revocation is reserved absolutely, it is for the legislature to determine when the occasion requires its exercise, and their decision cannot be reconsidered by the judiciary.¹ The law was so held in *Greenwood v. The Freight Co.*;² and *The Bridge Co. v. The United States*³ went still farther, by deciding that where Congress, in sanctioning the erection of a bridge according to the charters which had been granted by Kentucky and Ohio, reserved the right to "withdraw the assent hereby given" in case the bridge should at any time obstruct the navigation of the river, and the company proceeded to erect such a bridge as the charters called for, the question whether it obstructed the navigation was exclusively for Congress, which might require it to be altered or taken down without compensating the corporation. Bradley, J., said that in whether the obligation of a contract has been impaired, depends on a preliminary inquiry, Is the contract binding, and how should it be construed? and where the State is a party, is affected by considerations that do not apply among individuals. For as the object in establishing legislative assemblies is to provide for the general welfare, they should not adopt any measure that cannot be repealed if it proves injurious, or unforeseen events require a change. A statute is therefore *prima facie* a declaration of a legislative purpose which may be revoked at pleasure, and not a contract that must be observed without regard to consequences. The question is one of intention; but the presumption that the legislature act in their sovereign capacity as lawgivers is strong, and should not be disregarded unless the contrary appears unmistakably.

There is another consideration of equal moment. The State is necessarily at a disadvantage in dealing through agents whose interests are not involved, or may be at variance with her own, and entitled to the protection which

¹ *Crease v. Babcock*, 23 Pick. 334; *Worcester v. The Railroad Co.*, 109 Mass. 103; *Spring Valley Water Works v. Schottler*, 110 U. S. 347.

² 105 U. S. 13.

³ 105 U. S. 470.

equity affords to persons who hold an unequal relation and are open to undue influence and imposition.

Agreeably to *Fletcher v. Peck*,¹ it is not admissible to prove that a legislative grant was procured by bribery or fraud; and such evidence would be unavailing if received, because it might well be that a majority would have been in favor of the bill, though none of the members were bribed. Strong as were the reasons given by Chief-Justice Marshall, we may believe that the country would gain financially and as regards public morals if legislators knew in casting their votes that their course could be scrutinized in a court of justice, and no grant that was unduly obtained allowed to stand.² The Commonwealth is nevertheless protected by holding, as a rule of policy rather than interpretation, that no right or privilege shall pass by an act of assembly which is not set forth with such clearness as will enable the community to know what is conferred or repealed, and prevent any member from alleging ignorance as an excuse; and the Constitutions of many of the States provide, with a view to this end, that the subject of all bills shall be clearly expressed in the title. The maxim, *Omnia contra proferentem*, which precludes a man who has

¹ 6 Cranch, 138.

² Such was the opinion of Chief-Justice Black, as expressed in conversation while acting in 1874 in the Convention which framed the Constitution of Pennsylvania; and the judicial scrutiny which he advocated would be preferable to the official oath exacted in that State, which casts a slur on every man who takes it, and restrains no man who is capable of the practices which he is required to abjure. The oath reads as follows: "I do solemnly swear (or affirm) that I will support, obey, and defend the Constitution of the United States and the Constitution of this Commonwealth, and that I will discharge the duties of my office with fidelity; that I have not paid or contributed, or promised to pay or contribute, either directly or indirectly, any money or other valuable thing to procure my nomination or election (or appointment), except for necessary and proper expenses expressly authorized by law; that I have not knowingly violated any election law of this Commonwealth, or procured it to be done by others in my behalf; that I will not knowingly receive, directly or indirectly, any money or other valuable thing for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law."

used ambiguous language, and thereby misled others, from asking that it shall be taken in the sense most favorable to himself, is consequently inapplicable to the Commonwealth;¹ and when a charter of a railway company or the grant of a franchise in any other form, admits of a reasonable doubt, it will be solved in favor of the public and against the grantees, who will take nothing that is not given expressly or by an implication equally plain with words.² The State will never, therefore, be presumed to have parted with any of its prerogatives or franchises if the instrument can be differently interpreted without doing violence to the words considered severally and as a whole.³ Such is the rule in England as to charters from the Crown, and it applies in the United States to those given by the legislature.⁴ A grant of the water-power of a river to a navigation company will not confer a title to the water or preclude a neighboring town from pumping it into reservoirs for distribution among the inhabitants.⁵ So a grant of the right to maintain a bridge and collect the tolls, does not debar the legislature from authorizing the construction of a free bridge beside the first, although the latter is thereby rendered valueless as a means of gain.⁶

In the case of *The Charles River Bridge v. The Warren*

¹ See *Douglass v. Reynolds*, 7 Peters, 113; 2 American Leading Cases (5 Am. ed.), 38, 45.

² 2 Smith's Leading Cases (7 Am. ed.), 471.

³ *The Susquehanna Canal Co. v. Wright*, 9 W. & S. 11; *The Bank of Pennsylvania v. The Commonwealth*, 19 Pa. 155; *Stone v. The Farmers' L. & T. Co.*, 116 U. S. 307, 320; *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 544; *The Ohio Life Insurance & Trust Co. v. Debolt*, 16 Howard, 416; *Ruggles v. Illinois*, 108 U. S. 536. As is said in Black on Constitutional Prohibitions, sect. 52: "The rule that words are to be taken in the strongest sense against the party using them, does not apply to a contract by a State embodied in a charter, for the promoters rather than the legislature must be considered as the framers of the contract."

⁴ *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 544.

⁵ *The Mayor v. The Commissioners*, 7 Pa. 358.

⁶ *The Charles River Bridge v. The Warren Bridge*, 11 Peters, 544; *Railroad Commission Cases*, 116 U. S. 307, 325.

Bridge,¹ the controversy was whether the legislature of Massachusetts could, after chartering a toll-bridge between Boston and Cambridge, authorize the erection of a free bridge across the same river close to the former structure. The court was divided in opinion; but the decision was, that in the absence of an express restriction none could be implied, and both grants might stand. A charter was not like the gift of a specific thing, but a part of the sovereign power of the State bestowed on individuals; and as the first grant did not exhaust the power, it might be exercised a second time.

The principle is well settled; the only question being how far it extends. In *The Richmond R. R. v. Louisiana R. R.*,² the legislature of Virginia had, in incorporating the Richmond Railroad, stipulated that no other road should be built between Washington and Richmond within a certain distance that would presumably diminish the number of passengers on the complainant's railway. Another company was subsequently authorized by charter to construct a railway having one terminus at Washington and the other at Lynchburg, which, after running parallel with the Richmond Railroad for a number of miles, diverged. The Supreme Court held that when a private corporation claimed a privilege in diminution of the public right, the well-established rule of construction was that any ambiguity in the contract should operate against the corporation and in favor of the public.

Curtis, J., dissented on the ground that the act complained of was a plain infringement of the contract. The rule that grants made by the public should be interpreted favorably to the grantor was, like its converse, *fortius contra proferentem*, which prevailed in private grants, the last to be applied, and only when other methods of interpretation failed. The only safe guide was the intention of the parties; and when that was manifest, or could be ascertained, it must prevail. In the case under consideration the stipulation was said to relate to passengers travelling directly from one city to the other. The word "between" might admit of that interpretation, but did not require it. It might properly designate

¹ 11 Peters, 420.

² 13 Howard, 71.

any part of the intermediate space as well as the whole. What was intended must be sought in the residue of the sentence, which showed that the object was to prevent competition; and the charter should be so construed as to give effect to the design.¹

A provision in the charter of a bridge prohibiting the erection of another bridge will not preclude the construction of a viaduct which does not admit of ordinary traffic and is designed exclusively for the passage of railway trains. The point was decided by the Chancellor of New York in *The Mohawk Bridge Co. v. The Utica & Schenectady R. R. Co.*,² and recently by the Supreme Court of the United States in *The Bridge Proprietors v. The Hoboken Co.*³ The court said that a railway viaduct was, in the most general sense of the term, a bridge, as a railway car was a carriage, but that the case was one of the many instances where the same word was from necessity used to express things differing materially in their nature. The doctrine that public grants are not to be enlarged by implication was applied in another form in *The Turnpike Co. v. The State*; ⁴ but in the case of the *Binghampton Bridge Co.*, already cited, a stipulation that one company should have all the rights and privileges that had previously been conferred on another, was held sufficiently explicit to bind the State.

The rule applies *a fortiori* where the right alleged to have been surrendered is, like that of taxation, an incident to sovereignty and essential to its effectual exercise.⁵ Neither the

¹ See 2 Smith's Leading Cases (7 Am. ed.), 471.

² 6 Paige, 564.

³ 1 Wallace, 116.

⁴ 3 Wallace, 211.

⁵ *The Railroad Commission Cases*, 116 U. S. 307, 326; *The Philadelphia & Wilmington R. R. v. Maryland*, 10 Howard, 376; *The Providence Bank v. Billings*, 4 Peters, 514; *The Bank of Pennsylvania v. The Commonwealth*, 19 Pa. 144; *The Bank of Easton v. The Commonwealth*, 10 Id. 442; *The Railroad Co. v. Gaines*, 97 U. S. 697; *The Erie R. R. Co. v. The Commonwealth*, 66 Pa. 84; *The Delaware R. R. Tax Case*, 18 Wallace, 206, 226; *The Memphis R. R. Co. v. The Commissioners*, 112 U. S. 609, 617.

right of taxation nor any other sovereign power will be held to have been relinquished unless the intention is expressed in terms too plain to be mistaken. Such contracts are to be rigidly scrutinized, and never allowed to extend farther in scope or duration than the terms clearly require; and if a doubt arises, it must be solved in favor of the State.¹

In *The Providence Bank v. Billings*,² Marshall, C.-J., said that a State might for a valuable consideration relinquish the right to tax, but as the right was one in which the community was interested, such an intention ought not to be presumed in any case where it did not distinctly appear; and in *The Easton Bank v. The Commonwealth*, a charter incorporating a bank on the conditions thereafter expressed, one of which was that the bank should pay eight per cent on its dividends, was held not to forbid an augmentation of the tax.

¹ *Vicksburg R. R. Co. v. Dennis*, 116 U. S. 665, 668; *Newton v. The Commissioners*, 100 U. S. 548; *The Delaware R. R. Taxes*, 18 Wallace, 206; *The Munson Passenger R. R. Co. v. Philadelphia*, 101 U. S. 528.

"The rule of interpretation is well settled in this court. In *Tucker v. Ferguson*, 22 Wallace, 527, we said: 'The contract must be shown to exist. There is no presumption in its favor. Every reasonable doubt should be resolved against it. Where it exists, it is to be rigidly scrutinized, and never permitted to extend, either in scope or duration, beyond what the terms of the concession clearly manifested on the part of the State to grant what is claimed. Such a purpose cannot be inferred from equivocal language. *Providence Bank v. Billings*, 4 Peters, 514; *Gilman v. City of Sheboygan*, 2 Black, 510. It must not be a mere gratuity; there must be a sufficient consideration, or, no matter how long the alleged right has been enjoyed, it may be resumed by the State at its pleasure. *Christ Church v. Philadelphia*, 24 Howard, 300. No grant can be raised by mere inference or presumption, and the right granted must be clearly defined. *Charles River Bridge v. Warren Bridge*, 11 Peters, 420. "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court." *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Newton v. The Commissioners*, 100 U. S. 548.

² 4 Peters, 514.

It was decided on like grounds in *The Holyoke Co. v. Lyman* that even if the legislature of a State can confer an irrevocable power to construct a dam across a river flowing through two or more States which will permanently exempt the grantees from leaving a way open for the passage of fish, and thus materially lessen the available supply of food, such an intention will not be implied from the grant of the right to erect the dam, nor unless it is expressed in terms.¹

"Charters of private corporations duly accepted, it must be admitted, are executed contracts; but the different provisions, unless they are clear, unambiguous, and free from doubt, are subject to construction; and their true intent and meaning must be ascertained by the same rules of interpretation as other legislative grants. Repeated decisions of this court have established that whenever privileges are granted to a corporation and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms.² Whatever is not unequivocally granted in such acts is taken to have been withheld; as all acts of incorporation and acts extending the privileges of corporate bodies are to be taken most strongly against the corporations."³

It has been decided, conformably to the same principle, that a statute or ordinance authorizing a natural or artificial person to use or occupy a street or highway is, in the absence of a plainly expressed intention that the right shall be permanent, a mere license and as such revocable, although the grantee has made valuable improvements in the belief that the privilege will not be recalled.⁴ In the case last cited, the city councils of Philadelphia gave the complainant a written

¹ *Holyoke Co. v. Lyman*, 15 Wallace, 522.

² *Rice v. Railroad Co.*, 1 Black, 380; *Charles River Bridge v. Warren Bridge*, 11 Peters, 544.

³ Sedgwick on Statute and Constitutional Law, 339; *Lees v. Canal Co.*, 11 East, 652; *Holyoke Co. v. Lyman*, 15 Wallace, 511.

⁴ *The Southwark R. W. Co. v. The City of Philadelphia*, 47 Pa. St. 314; *Branson v. The City*, 47 Pa. 329.

permission to construct a turnout or siding from the city railway in Broad Street to his warehouse. The city subsequently proposed to remove the railway; and the complainant asked for an injunction, on the ground that he had gone to a great expense in the erection of fixtures for the prosecution of his business, which would be useless unless the railway was allowed to remain. The court held that if a license to connect a private with a public way might operate as a contract that the public way should remain open, where the question arose as between individuals, it did not admit of such an interpretation when given by a municipal corporation and the streets of a city were concerned. A like view was taken in *The Monongahela Navigation Co. v. Coons*¹ with regard to a dam which had been erected across a navigable stream under a general authority conferred by statute.

These decisions are obviously sound. An individual who gives a license which cannot be enjoyed without the expenditure of money, may fairly be presumed to intend that it shall be irrevocable;² but no such inference can be drawn where the State or a city is dealing with a highway, and ought to retain the power of supervision and control.

It has been decided on like grounds that the enumeration of particular burdens or restrictions in a charter, as those to which the company is or may be subjected, will not preclude the State or a municipal corporation from imposing others which fall within the scope of its general powers, and are legitimate if they do not contravene the constitutional prohibition. A statute imposing a tax of eight per cent on each yearly dividend of the banks which it incorporates, will be interpreted as meaning that they shall pay so much, and not that the rate shall not be increased by future legislation.³ So the incorporation of a railway company with authority to pass through a city, subject "to such regulations as may be required for paving, repairing, and culverting the streets,"

¹ 6 Watts & Sergeant, 101, 112.

² 2 Am. Leading Cases (5 Am. ed.), 546; *Rerick v. Kern*, 14 S. & R. 267.

³ *The Bank v. The Commonwealth*, 10 Pa. 442, 449; *The Bank of Pennsylvania v. The Commonwealth*, 19 Pa. 144, 155.

will not preclude the city councils from exacting an annual license fee of thirty dollars for each car and prescribing the charges for the conveyance of passengers.¹ "*Expressio unius exclusio est alterius* is not," said Sharswood, J., "the rule of construction applicable to charters."

In like manner, the power of a State to regulate the charges of railway companies for the transportation of persons and property within her limits is governmental, "and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent." If there is a reasonable doubt, it is to be resolved in favor of the existence of the power. In the language of Chief-Justice Marshall in the *Providence Bank v. Billings*,² a surrender of such powers "ought not to be presumed unless the purpose appears to have been deliberately entertained and is distinctly expressed."³

When the intention to confer an immunity from taxation is distinctly expressed, or a necessary inference from the words employed, the court will not resort to a strained interpretation for the sake of withholding a privilege which may have been the chief inducement to the acceptance of the grant or charter.⁴ A clause in an act of incorporation providing for a specific tax on the shares of a bank, and that it "shall be in lieu of all others," is in effect a stipulation that no other or greater tax shall be imposed, and will be binding as such on the same and subsequent legislatures. Where the legislature of Pennsylvania authorized a railroad company, chartered by the State of New York, to pass through Pennsylvania, and subsequently granted the same company other privileges by a statute which imposed a tax of \$10,000 per annum, "together with such further taxation of their

¹ *Johnson v. Philadelphia*, 60 Pa. 440.

² 4 Peters, 514, 561.

³ *Stone v. The Farmers' Loan & Trust Co.*, 116 U. S. 307, 325; *Railroad Co. v. Maryland*, 21 Wallace, 456; *The Chicago, B. & Q. R. R. Co. v. Iowa*, 94 U. S. 155; *Ruggles v. Illinois*, 108 Id. 526, 531.

⁴ *Farrington v. Tennessee*, 95 U. S. 679; *The Commonwealth v. The Pennsylvania Canal Co.*, 66 Pa. 46, 65.

stock to an amount equal to the cost of construction of that part of their road situate in the Commonwealth as similar property in this State is or may be subject to," it was held to be an implied contract which precluded additional taxation.¹

An exemption from taxation will, in obedience to the general principle, "Nothing is to be taken for granted against the State," be construed as the personal privilege of the individuals or company on whom it is specifically conferred, unless the manifest intention is that the privilege shall pass as a continuing franchise to assignees or purchasers.² This rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and the duty of each man to bear his share of the common burden, and therefore not to be extended beyond the exact legislative requirements of the grant construed *strictissimi juris*. A grant to one company of all the rights and privileges of another may carry with it an exemption from taxation conferred in the former charter;³ but a sale of the road-bed, property, and franchises of a railroad company will not ordinarily entitle the purchasers to the immunity from taxation which the company themselves enjoyed,⁴ nor will it render the purchasers a body corporate, or entitle them to act otherwise than as individuals. The franchise of becoming and being a corporation is incommunicable by the act of the parties, and will not pass under a judicial sale, unless there is some provision to that effect in the charter or the statute by which the sale is regulated.⁵ What

¹ The New York & Erie R. R. Co. v. Sabin, 26 Pa. 242.

² Morgan v. Louisiana, 93 U. S. 217; Wilson v. Gaines, 103 Id. 417; Louisville R. R. Co. v. Palmes, 109 Id. 244; Memphis R. R. Co. v. The Commissioners, 112 Id. 609, 617; Chesapeake & Ohio R. R. Co. v. Miller, 114 Id. 176.

³ Humphrey v. Pegues, 16 Wallace, 244; The Railroad Co. v. Gaines, 97 U. S. 697.

⁴ Morgan v. Louisiana, 93 U. S. 217; Memphis R. R. Co. v. The Commissioners, 112 Id. 609.

⁵ Commonwealth v. Smith, 10 Allen, 448; Hall v. Sullivan R. R. Co., 21 Law Reporter, 138; 2 Redfield's Am. Railway Cases, 621; Memphis R. R. Co. v. The Commissioners, 112 U. S. 609, 619.

the purchasers acquire is the ownership of the railroad and the rolling-stock and other property requisite for its use, and the franchise of maintaining it and operating it as such, — privileges which may be as well exercised by natural persons as by a corporation. As was said in the *Central R. R. & Banking Co. v. Georgia*,¹ it is an unbending rule that a grant of corporate existence is never implied. In the construction of statutes every presumption is against it; and the principle applies to the transfer or assignment of a previously existing charter and of the right to act as a body corporate under it.

When, however, an exemption from taxation is conferred with a view of enhancing the value of the property in question and inducing third persons to become buyers, it may be binding not only in favor of the original grantee, but of every one who gives value in the belief that it will not be repealed,² and will in effect run with the property or land. Charters obey the general rule that contracts do not operate in favor of third persons; but there are under these circumstances two contracts, one with the first takers, the other with the persons who deal with them in reliance on the assurance held forth by the State.

In the case first cited, the State of New Jersey purchased the Indian title to lands in that State, and as a consideration for the purchase bought another tract of land as a residence for the Indians, having previously passed an act declaring that such lands should not be subject thereafter to any tax by the State, any law or usage or law then existing to the contrary notwithstanding. The Indians lived upon the tract until the year 1801, when they were authorized to sell it by an act which contained no provision in respect to future taxation. The sale took place, and the legislature soon afterwards repealed the exemption and laid a tax, which the Supreme Court of the United States declared invalid. Although the privilege

¹ 92 U. S. 665, 670.

² *M'Gee v. Mathis*, 4 Wallace, 143; *Hartman v. Greenhow*, 102 U. S. 679. See *Woodruff v. Trapnell*, 10 Howard, 190; *Furman v. Nichol*, 8 Wallace, 44; *Exchange Bank v. Knoup*, 19 Grattan, 739; *Antoni v. Wright*, 22 Pa. 833; 847 for the same principle. See *ante*, p. 587.

was given for the benefit of the Indians, it was annexed to the land which had been given in lieu of the property which they surrendered, and they were entitled to profit by it not only while they resided on the land, but through the increased value in the event of a sale. A like interpretation was put, in *McGee v. Mathis*, on a legislative issue of transferable scrip for work done in the drainage of certain swamp-lands, with a proviso that it should be received in payment for so much of the lands as the holder should select, which should be exempt from taxation for the term of ten years. The plaintiff subsequently, and before the passage of a law by which the exemption was repealed, became the purchaser for a valuable consideration of a large amount of the scrip, and with it, after the repeal, took up and paid for many sections of the land. The court held that the privilege inured not only to the persons to whom the scrip was issued, but to every one to whom it was afterwards assigned, and that the land could not be taxed during the stipulated period consistently with the Constitution of the United States.¹

The current of decision sometimes varies like the tides, as every lawyer finds who relies on precedents, and in *Morgan v. Louisiana*² the court reached a different conclusion under circumstances which might have been thought analogous. The legislature there exempted the capital stock, works, fixtures, vehicles of transportation, and other appurtenances of a railway company from taxation, and also empowered the company to borrow such sums of money as might be requisite, and secure the same by a mortgage of their property and franchises. A mortgage having been executed in pursuance of the power, the mortgagee proceeded to judgment and execution, and the property and franchises of the company were sold by the sheriff and purchased by the defendant in error *Morgan*; and it was held that the exemption from taxation was personal to the company, and did not pass by

¹ *New Jersey v. Wilson*, 7 Cranch, 164; *Given v. Wright*, 117 U. S. 648, 655; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *McGee v. Mathis*, 4 Wallace, 146.

² 93 U. S. 217.

the sale. Such an immunity might loosely be called a franchise, but did not come under that head when appertaining to a railway company. The franchises of such a corporation are the rights and privileges essential to the operation of the road, and without which it would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are the positive rights or privileges, without which the road cannot be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without an express statutory direction. Where "such rights and privileges" are expressly stated to be conferred "for the purpose of making and using the road," an accompanying exemption from taxation is presumably confined to the grantee, unless the circumstances or words employed indicate that it was meant to be susceptible of sale or transfer.¹ No one contends that a statute exempting the property of a charitable or literary institution will run with the land to a purchaser, although the privilege may attach to the property bought with the proceeds of the land so conveyed.

The acts of a legislative assembly are presumably laws susceptible of modification or repeal by the same or any subsequent legislature, and to render them irrevocable the intention must appear with a clearness which cannot be misunderstood. Such would seem to be the true import of the case of *Lord v. Litchfield*,² and the principle was applied in *The People v. Roper*.³ The legislature there enacted that the property of all persons who should serve in the militia for seven years should be exempt from taxation, and the statute was held to be merely declaratory of an existing legislative intent, and not a contract.⁴

¹ *Morgan v. Louisiana*, 93 U. S. 217.

² 36 Conn. 116. See *ante*, p. 590.

³ 35 N. Y. 630.

⁴ "Had specific contracts been entered into with each of the relators

'that if he would volunteer to equip himself and perform militia duty at stated periods during the next seven years, he should thenceforth be released from all future obligations due from him as a citizen to the government,' it would be material to consider whether the people had clothed their agents with authority to enter into such an engagement. The mere fact that there was the form of a contract, and that those who made it intended that it should not only be operative but indissoluble, would not necessarily bring it within the protection of the Federal Constitution. The clause in that instrument which prohibits the passage of State laws 'impairing the obligation of contracts,' applies only to contracts which impose obligations under the general principles of law. It does not extend to those which are void in their origin under the State Constitution, nor to those entered into without authority from the party sought to be bound. We find nothing in the decisions of the State or the federal courts which leads us to suppose that such a contract could be enforced after legislative revocation. In the present case the claim is limited to a partial release of the citizen from his future obligations to the government as a promised reward for voluntary and meritorious services. It is substantially conceded that they were services which the State had a right to command, and that the only evidence of its purpose to acknowledge them by a future gratuity is to be found in a provision of the general law which it had an undoubted right to repeal. It is claimed, however, that the law thus repealed contained within itself an irrepealable contract, imposing obligations on the State which the federal courts are bound to enforce.

"It is true that the State may, if it will, within the limits prescribed in its organic law, enter into private contracts with its citizens by which the people and the government are forever bound; but we are never to construe a general statute as embracing such a purpose when it is obvious that it was designed only as an expression of the legislative will for the time being in a matter of mere municipal regulation. When this is the object of the law, those who act upon the faith of its provisions do so with a reasonable assurance, indeed, that it will not be modified or repealed until such action shall be required, in the judgment of the legislature, by the general interest of the community, but with notice that it is subject to revocation by the State whenever the public exigencies may demand. Such a repeal involves no breach of obligation in the sense of the Federal Constitution; for the faith reposed is on the stability of a general law, and not on the efficacy of a legal contract." *The People v. Roper*, 35 N. Y. 630.

LECTURE XXX.

The Obligation of a Contract arises from the Command of the Law that it shall be fulfilled. — The Obligation will be impaired by revoking the Command or rendering the Means of enforcing it ineffectual. — The Remedy may be abrogated or changed if a Sufficient Remedy is substituted or remains, but any Alteration in the Time or Mode of Performance or Measure of Damages for the Breach is unconstitutional. — The Prohibition is designed to guard against Retroactive Legislation, and will not be violated by a Law which affects only Subsequent Contracts. — A State may enact a Bankrupt or Insolvent Law as to Future Contracts, but not as to those already made. — The Legislature cannot authorize a Debtor to pay the Creditor's Taxes and deduct them from the Debt. — A Law providing that the Bonds or Scrip issued by the State shall be received in Payment of Taxes, cannot be repealed as to subsequent Holders. — Chartered Privileges cannot be abrogated except under the Police Power or Right of Eminent Domain.

IF we now inquire what is the obligation which may not be impaired, the answer will be such as would naturally spring from the reflection that the prohibition is contained in the organic law and intended to control legislation. The moral obligation of a contract, or that arising from the natural law, is beyond the reach of law-makers, and would exist though they were to declare all contracts null, or provide that compensation should not be recovered in the event of a breach. What the framers of the Constitution therefore presumably had in view was the obligation resulting from the remedies through which the contract may be enforced. These are creatures of the law, and if they are repealed or rendered ineffectual, the obligation of past contracts is necessarily impaired; but no such alteration will occur in contracts made subsequently in subordination to the statute which works the change, and have no legal efficacy save that which it confers. In the former case the change disappoints the reasonable

expectation of the creditor that no law will be made with the view of enabling the debtor to violate the contract with impunity, and may be regarded as a breach of public faith; in the latter no one can allege that he was misled and did not know in entering into the contract that there were no means through which it could be enforced. The just inference, therefore, is, that the clause in question was intended as a check on retroactive legislation, and that the legislature are free to declare future contracts void, or that their only sanction shall be the shame of bad faith and the sentiment which prompts men to keep their word.

The question arose in *Ogden v. Saunders*,¹ and gave rise to a division of opinion in the Supreme Court of the United States. The point in controversy was, Does a discharge under a State insolvent law constitute a defence to an action on a contract made after the passage of the law? or, in other words, Can the legislature provide a means through which subsequent contracts may be rendered legally inoperative or annulled? Marshall, C.-J., Story and Daniel, JJ., were of opinion that the obligation springs directly from the contract. It is what the parties have agreed to do or to forbear. Any law which prospectively or retroactively discharges one party without the consent of the other, impairs the obligation. It is fallacious to suppose that the law by which a contract is enforced, forms a part of the contract. If it did, it would accompany the parties to any other country to which they might remove, and be binding on them there, although contrary to the law of the forum. Although a contract cannot be enforced without a remedy, the remedy is distinct from the obligation. The States may modify or control the former; they have no control over the latter. It was conceivable that a State might withhold all remedy without violating the Constitution. If she chose to close her courts, what power could open them?

The majority of the court gave a different and, as it would seem, more practical interpretation to the Constitution. The obligation of a contract is the force by which the parties are

¹ 12 Wheaton, 213.

held to what they have agreed on. Agreeably to the Institutes, obligation is the chain of the law by which we are compelled to render something prescribed by law: In the case of contracts, the command of the law that they shall be fulfilled, constitutes the obligation. In ascertaining the obligation of a contract, it is therefore necessary to consider not only what the parties stipulated, but how far it was binding under the then existing law. If that law pronounced the contract void, it had no obligation; and so if it held that the contract might be avoided on the happening of a particular event, the obligation would fail when the contingency occurred. What the Constitution designed to prohibit, was retroactive legislation. A statute declaring an antecedent contract void, or providing means through which it might be annulled, impaired the obligation by making it less than it was when originally incurred. But such a statute would not impair the obligation of a future contract, because the obligation came from the law and was what that made it. In the case under consideration, the debt was contracted after the passage of the statute under which the debtor had been discharged. Had the creditor been domiciled in the State, the certificate would have been valid; as he resided elsewhere and had not voluntarily submitted to the jurisdiction of the court, it was inoperative. Such is now the settled interpretation of the Constitution.¹

Three elements enter into the obligation of a contract, — the contract, the command of the law that it shall be fulfilled, and the remedy which renders the command obligatory, and without which it would be an empty form. There must not only be an agreement which the parties are morally bound to perform, but the courts must recognize the duty as one which can be reduced to judgment; and finally, there must be some sufficient means of carrying the judgment into effect. If the union of both minds in a common purpose constitutes the contract, the judgment is the command that it shall be performed, and the execution the force by which obedience is compelled. Where the contract is defective in form, in consideration, forbidden by statute, or for an immoral end,

¹ *Boyle v. Zacharie*, 6 Peters, 318; *Baldwin v. Hale*, 1 Wallace, 223.

there is no command, or, in other words, no right to judgment ; and such is also the case if no constitutional prohibition intervenes when the legislature vacates a contract which was valid under the pre-existing law. Finally, the command must be compulsory on the parties. There must be a remedy by which performance can be enforced, or compensation obtained if it is withheld.

It results from what has been said that the obligation of a contract is the law acting on the contract and rendering it binding on the parties. The contract is the occasion, the law the cause, of the obligation. So long as the law remains what it was when the contract was made, the obligation will not be impaired. Prospective legislation will not, therefore, contravene the provision which is the theme of the present chapter.¹ But a law operating retroactively, by which one party is exonerated or an additional duty is imposed on the other as a condition precedent to the right of suit, is manifestly unconstitutional, and void. An act rendering notice essential to a recovery against guarantors or irregular indorsers who were not entitled to notice under the previous course of decision, is invalid within this principle, though it does not apply to acts requiring pre-existing grants, mortgages, or judgments to be docketed or registered in order to preserve the obligation and inform purchasers, and giving a reasonable time for compliance.²

The second question, What laws impair the obligation? depends on the principle which governs the first. For as the obligation results from the command of the law that the contract shall be fulfilled, any law which revokes the command or renders it inefficacious will necessarily impair the obligation. Such a result may ensue from an enactment annulling the contract or declaring the whole or any part of it invalid, or by which the injured party is hindered or delayed in proceeding to judgment, or in carrying the judgment into execution. In the two former instances the law dispenses with instead of

¹ *Lehigh Water Co. v. Easton*, 121 U. S. 388, 391.

² *Jackson v. Lamphire*, 3 Peters, 280; *Hoff v. Jasper County*, 110 U. S. 53.

enjoining performance; in the latter the command is not imperative, and may be disobeyed. A command implies compulsion, the existence of some means to enforce obedience, and where contracts are in question, consists in the remedy given for the breach. A law modifying the remedy, or substituting one remedy for another, will not impair the obligation if a sufficient remedy remains.¹ There is still a command and a penalty for disobedience; but a law denying all remedy for the non-fulfilment of a prior contract, or subjecting the existing remedies to a condition by which they may be frustrated or indefinitely postponed, is necessarily unconstitutional.²

We are now in a position to define the duty which the Constitution of the United States imposes on the States relatively to the obligation of contracts. It is, first, that there shall be no change in the rule or command by which the performance of the contract is enjoined, and next, that there shall be no such change in the remedy as will render the command illusory.³ A statute giving three days of grace for the payment of promissory notes and bills of exchange, and prescribing the time and mode of demand and notice, might be to a great extent declaratory, and regulate or define without impairing the obligation of instruments made before or subsequently to its passage. A statute providing retroactively that such instruments shall be paid at the day might not impair the obligation relatively to the creditor, although it would be a deprivation without due process of law as regards the debtor. But a statute postponing the performance of an antecedent contract, although but for a single day, would be as repugnant to the constitutional prohibition as if the delay were for a month or year.

The principle is accurately stated in the following extract from the judgment of the Supreme Court of the United

¹ *Story v. Furman*, 25 N. Y. 214; *Coriell v. Ham*, 4 Greene (Iowa), 455; *Conkey v. Hart*, 4 Kernan, 22; *Evans v. Montgomery*, 4 W. & S. 218; *Long's Appeal*, 87 Pa. 114; *The Railroad Co. v. Hecht*, 95 U. S. 168.

² *Penrose v. The Erie Canal Co.*, 56 Pa. 46; *Seibert v. Lewis*, 122 U. S. 284, 295.

³ *Farmers' Bank v. Gunnell*, 26 Grattan, 144.

States, in the case of *Von Hoffman v. Quincy*,¹ which was recently cited and followed by the same tribunal²: "A statute of frauds embracing pre-existing parol contracts not before required to be in writing would affect their validity. A statute declaring that the word 'ton' should in prior as well as subsequent contracts be held to mean half or double the weight before prescribed, would affect their construction. A statute providing that a previous contract of indebtedment may be extinguished by a process of bankruptcy, would involve its discharge; and a statute forbidding the sale of any of the debtor's property under a judgment upon such a contract would relate to the remedy. It cannot be doubted, either upon principle or authority, that each of such laws passed by a State would impair the obligation of the contract, and the last mentioned not less than the first. Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion."

"The obligation of a contract 'is the law which binds the parties to perform their agreement.'³ The prohibition has no reference to the degree of impairment; the largest and least are alike forbidden. In *Green v. Biddle*⁴ it was said: 'The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the con-

¹ 4 Wallace, 535.

² *Edwards v. Kearzey*, 96 U. S. 600; *Seibert v. Lewis*, 122 Id. 281, 291.

³ *Sturges v. Crowninshield*, 4 Wheaton, 122.

⁴ 8 Wheaton, 81.

tract of the parties, impairs its obligation. Upon this principle it is that if a creditor agree with his debtor to postpone the day of payment, or in any other way to change the terms of the contract without the consent of the surety, the latter is discharged, although the change was for his advantage.'

"One of the tests that a contract has been impaired, is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or cause, but of encroaching in any respect on its obligation, or dispensing with any part of its force."¹

If the effect is produced, it matters not by what means, because the prohibition is absolute, and equally applicable whether the law operates directly on the contract, or to impair the remedies through which it may be enforced, or the proofs by which it is sustained. A law declaring that a pre-existing contract does not bind the parties, or liberating them from the obligation, is necessarily unconstitutional, and hence, as we have seen, a State cannot pass a retroactive insolvent or bankrupt law;² but the prohibition will also be violated by an enactment which injuriously varies the interpretation of the contract, the duties which it imposes,³ or the measure of damages,⁴ or which renders that which would not have been a defence when the contract was made an answer to an action brought to enforce its provisions;⁵ as, for instance, by enacting that actions on bonds or judgments confessed previously under a warrant of attorney may be defeated by proof of want of consideration.⁶

It results from these principles that the legislature cannot constitutionally authorize a debtor to pay the amount of a tax which has been imposed on the creditor into the State

¹ *Planters' Bank v. Sharp*, 6 Howard, 327.

² *Sturges v. Crowninshield*, 4 Wheaton, 122; *Ogden v. Saunders*, 12 Id. 213; *Von Hoffman v. Quincey*, 4 Wallace, 535, 552.

³ *Von Hoffman v. Quincey*, 4 Wallace, 535; *Edwards v. Kearzey*, 96 U. S. 600; *Black on Constitutional Prohibitions*, sect. 102.

⁴ *Wilmington R. R. v. King*, 91 U.S. 3; *Effinger v. Kenney*, 115 Id. 566.

⁵ *Cornell v. Hickens*, 11 Wis. 353; *McElvain v. Mudd*, 44 Ala. 48.

⁶ See *Williams v. Haines*, 27 Iowa, 251.

treasury, and then plead it as an entire or partial satisfaction of the debt. This is clear where the creditor is a non-resident,¹ and not less true when he is within the State; and the tax would be valid if laid directly on him. A law directing that the principal or interest of a debt shall be paid to a third person, is as contrary to the obligation as a law authorizing the debtor to retain the money for his own use. For like reasons a State or a municipal corporation cannot assess its bonds or loans and then deduct the tax from the sum due the creditors. Such a tax may be valid as regards persons who reside within the jurisdiction, but must be collected from the creditor, and not deducted by the debtor.²

In *Murray v. Charleston*, the clause providing that no State shall pass a law impairing the obligation of contracts, was said to be a limitation on the taxing power of the States as well as on all their other legislation; and the use of that power to vary the stipulations of a contract, or relieve the debtor from a strict and literal compliance with its terms, was unconstitutional and void. A city could not, therefore, free itself from the obligation to pay the principal and interest of its loans by an ordinance worded as a tax, but in effect authorizing the deduction of the amount from the sum due the creditor.³

¹ *Tax on Foreign Bonds*, 15 Wallace, 319; *Hartman v. Greenhow*, 102 U. S. 672.

² *Murray v. Charleston*, 96 U. S. 432; see *ante*, p. 319.

³ "It may," said Strong, J., "safely be affirmed that no State by virtue of its taxing power can say to a debtor: 'You need not pay to your creditor all of what you have promised to him. You may satisfy your duty to him by retaining a part for yourself, or for some municipality, or for the State Treasury.' Much less can a city say, 'We will tax our debt to you, and in virtue of the tax withhold a part for our own use.' What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the State and in subordination to it? Is it meant that when a person lends money to a State, or to a municipal division of the State having the power of taxation, there is in the contract a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid before payment? That cannot be; because if it could, the contract (in the language of Alexander Hamilton) would 'involve two contradictory things, — an obligation to do, and a right

Agreeably to these decisions, contracts, unlike lands or chattels, cannot be taxed irrespectively of the owner's residence, and whether he is, or is not, personally subject to the power of the government which lays the tax; nor can a State constitutionally assess the money which it has borrowed, and make the tax a pretext for not paying the principal and interest in full. It may be impracticable to enforce the rule

not to do; an obligation to pay a certain sum, and a right to retain it in the shape of a tax. It is against the rules both of law and of reason to admit by implication in the construction of a contract a principle which goes in destruction of it.' The truth is, States and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. Hence, instead of there being in the undertaking of a State or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity. Is, then, property, which consists in the promise of a State, or of a municipality of a State, beyond the reach of taxation? We do not affirm that it is. A State may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched. But until payment of the debt or interest has been made, as stipulated, we think no act of State sovereignty can work an exoneration from what has been promised to the creditor,—namely, payment to him,—without a violation of the Constitution. 'The true rule of every case of property founded on contract with the government is this. It must first be reduced into possession, and then it will become subject, in common with other similar property, to the right of the government to raise contributions upon it. It may be said that the government may fulfil this principle by paying the interest with one hand, and taking back the amount of the tax with the other. But to this the answer is, that to comply truly with the rule, the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors, and it ought besides to be so regulated as not to include a lien of the tax upon the fund. The creditor should be no otherwise acted upon than as every other possessor of money; and, consequently, the money he receives from the public can then only be a fit subject of taxation when it is entirely separated' (from the contract) 'and thrown undistinguished into the common mass.' 3 Hamilton's Works, 514 *et seq.*"

when the debtor is a sovereign and cannot be sued ; but it is valuable as teaching a lesson of good faith which may hinder governments from evading their obligations under the guise of taxation.

While a debtor cannot legitimately be empowered to appropriate the amount due, to the payment of the creditor's debts without his assent, the same end may be attained indirectly through a judicial proceeding ; and there is no constitutional objection to a statute authorizing the attachment of a debtor's assets, including the sums owing to him, as a means of satisfying the demands of the State or of private creditors. Such a statute may operate retroactively to compel the garnishee to pay the plaintiff in the attachment instead of the defendant, as was agreed ; but the decree is pronounced by a court after a hearing at which all the parties may be present. Writs of this kind were issued under the custom of London at an early period, and are now largely employed in the United States both as mesne and final process. The right of set-off is, moreover, generally admitted ; and if a government or municipality may legitimately tax its bonds, there seems to be no sufficient reason why it should not deduct the tax in settling with its creditors. The point really at issue is, Can such a tax be imposed consistently with the good faith which should be observed by nations ?

The contracts of a State are, as we have seen, not less strongly guarded against retroactive legislation than those of individuals ; and a law declaring them invalid, or prohibiting her officers or agents from carrying them into effect, will be invalid, and cannot be set up as a justification for a failure to perform any act which was incumbent under the contract as originally made.¹ Hence, when notes or coupon bonds issued by a State or by a bank which she has organized, are taken by individuals on the faith of a legislative declaration that they shall be received for taxes, a law repealing this provision and forbidding the collector to comply with its

¹ *New Jersey v. Wilson*, 7 Cranch, 164 ; *Wolff v. New Orleans*, 103 U. S. 358 ; *Keith v. Clark*, 97 Id. 454 ; *Poindexter v. Greenhow*, 114 Id. 270 ; *Hartman v. Greenhow*, 102 Id. 672. See *ante*, p. 586.

terms will be simply void,¹ and an officer who refuses to receive such notes or coupons when duly tendered by a taxpayer, and proceeds to collect the amount by distress, may be enjoined, or an action brought to recover back the goods.² Such a suit is not against the State, or within the scope of the Eleventh Amendment, because the States, the President of the United States, and Congress, are in contemplation of law as incapable of giving an unconstitutional order as was the king, and such a mandate will no more protect those who act under it than would a writ which exceeded the jurisdiction of the court.³ So also where the laws of the State require an attorney to purchase a license before entering on the practice of the law, the license fee is a tax, and the tender of such coupons as those above described will be equivalent to payment.⁴ And if the attorney is subsequently convicted for practising without a license, the record may be removed to the Supreme Court of the United States and the judgment reversed.⁵

In the *Planters' Bank v. Sharpe* an act forbidding any banks within the State to "indorse or otherwise transfer any note, bill receivable, or other evidence of debt," was held invalid as regarded an existing bank which was expressly authorized by its charter "to have, possess, and enjoy lands, tenements, hereditaments, goods, chattels, and effects of what kind soever," and "the same to grant, demise, alien, or dispose of," and also "to discount all bills of exchange and notes." The court held that the *jus disponendi* was an incident of property which could not be taken away without diminishing its value, and consequently impairing the obligation of the contract which conferred the right.

The prohibition is not less applicable where the injury is

¹ *Woodruff v. Trapnall*, 10 Howard, 190, 208.

² *Poindexter v. Greenhow*, 114 U. S. 270; *Antoni v. Greenhow*, 107 Id. 769; *Clarke v. Tyler*, 30 Grattan, 134.

³ *The United States v. Lee*, 106 U. S. 196; *Poindexter v. Greenhow*, 114 Id. 270, 290. See 1 Smith's Leading Cases (8 Am. ed.).

⁴ *Woodruff v. Trapnall*, 10 Howard, 190, 208.

⁵ *Royall v. Virginia*, 116 U. S. 572.

incidental, arising from a second grant which conflicts with the first; and a stipulation in the charter of a bridge or railway company that no road or structure of a like kind shall be built between the same points or within a certain distance on either side, is valid, and will preclude the right to grant another franchise which will impair the value of the first.¹

In the case last cited, a bridge was built at Binghamton across the Chenango River under a charter from the legislature of New York which provided that the company should have all the rights, privileges, and advantages conferred in the charter of the Delaware Bridge Co. and that "all the provisions, sections, and clauses of said charter should be extended to the charter of the Binghamton Bridge, if not inconsistent therewith." Among these clauses was one providing that no bridge should be erected within two miles on either side. Binghamton was then an inconsiderable village; but it subsequently became a large and thriving town, and a single bridge was inadequate to the wants of the inhabitants. The legislature of New York accordingly authorized the construction of a second bridge near the first, to meet the need. When the question came before the Supreme Court of the United States on a writ of error, that tribunal held that the Binghamton Bridge Co. had all the rights of the Delaware Bridge Co., and among them that of insisting that no other bridge should be built within two miles of their own. So the grant of an exclusive right to supply gas to a city and its inhabitants through pipes and mains laid in the public streets is a contract which binds the municipality, and will be impaired by the grant of a like right to another company during the period fixed for the continuance of the first;² and such also is the rule as to a franchise for the supply of water.³

¹ See *The Boston & Lowell R. R. v. The Salem & Lowell R. R.*, 2 Gray, 1; *East Hartford v. The Hartford Bridge Co.*, 17 Conn. 78; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 662; *The Charles River Bridge v. The Warren Bridge*, 11 Peters. 420; *The Richmond R. R. v. The Louisa R. R.*, 13 Howard, 71; *The Binghamton Bridge Case*, 3 Wallace, 51.

² *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650.

³ *New Orleans Water Works v. Rivers*, 115 U. S. 674; *ante*, p. 607.

The inconvenience of such a course of decision is obvious, and would be intolerable, but that, as I have elsewhere stated, the franchises granted by a State are, like all other property, subject to the right of eminent domain, and may be resumed by the legislature on the payment of an adequate compensation.¹ In these instances the grant was exclusive in terms; and when such is not the case, conferring a chartered right or privilege will not preclude the legislature from making a like grant to another company, although it materially lessens the value of the first. The rule in such cases is the converse of that which prevails between individuals, where in a doubtful case that interpretation will be adopted which is most favorable to the grantee.

A law imposing a duty on either party to a contract that does not arise from its terms, may be an arbitrary deprivation; but if it does no more, will not impair the obligation of the other party to him. The case is obviously different where the statute makes requirements which are conditions precedent, and must be fulfilled before the opposite party can be compelled to do as he agreed. The obligation of a mutual or bilateral contract will consequently be impaired by so increasing the obligation of either party as to lessen the debt due to him or hinder him from enforcing it by suit. A tenant is entitled to quiet enjoyment during the term, and the landlord to possession when it ends; and a law making either right dependent on the performance of an act not enumerated in the lease—as, for instance, that the tenant shall pay the taxes, or the landlord make compensation for improvements—will be invalid. Parliament, as the recent course of English legislation indicates, may so deal with contracts; but no such power resides in Congress or the legislatures of the several States.² Such also would be the effect of a law authorizing a vendor to deliver less than the contract calls for, or requiring the purchaser to pay more in order to entitle him to a

¹ See *West River Bridge Co. v. Dix*, 6 Howard, 507; *Richmond R. R. v. Louisa R. R.*, 13 Id. 71; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 673. See *ante*, p. 608.

² *Palairot's Appeal*, 67 Pa. 493; *The Sinking Fund Cases*, 99 U. S. 700.

conveyance; and an enactment that a failure of title shall be a defence to an action brought for the purchase-money of land, in the absence of a warranty or covenant of seisin, would fall in the same category.

Whatever the rule may be in other instances, where, as in the case of a charter, the State is a party to the contract, it cannot impose any terms or conditions not contained in the grant. A stipulation that an incorporated company shall do so much, implies that they shall not be called on for more; and if more is required, the obligation will be impaired, because the presumption is that the charter was accepted in the belief that its terms would be observed.¹ It is equally clear that a State cannot evade the constitutional prohibition by declaring a valid contract void for a want of form or substance, or as having been made for an illegal end; and such legislation will simply leave the obligation where it was before the passage of the statute.² The question is not necessarily concluded by a decision of the highest State tribunal that the contract was invalid from the outset, because the duty of the Supreme Court of the United States to see that the obligation of contracts is not impaired, involves the right to determine whether the contract was obligatory under the pre-existing law.³ Although the federal tribunals are also courts of the several States and should administer justice according to the laws of each State as construed by its courts of last resort, wherever the operation of the Constitution of the United States, of treaties, or of acts of Congress is not involved, yet in this last class of cases the Supreme Court of the United States is the arbiter by whose opinion the judgments of the highest courts of the respective States must stand or fall.⁴ It was on this ground that the Supreme Court of

¹ *The Planters' Bank v. Sharp*, 6 Howard, 301.

² *Keith v. Clark*, 97 U. S. 454.

³ See *ante*, p. 503.

⁴ *Knoup v. The Piqua Bank*, 1 Ohio, n. s. 603; *The Jefferson Bank v. Skelly*, 1 Black, 436; *The Northwestern University v. People*, 99 U. S. 309; *Delmas v. The Insurance Co.*, 14 Wallace, 661; *Keith v. Clark*, 97 U. S. 454; *The Commonwealth v. The Pittsburgh R. R. Co.*, 8 P. F. Smith, 26, 44.

the United States held that laws exempting the property of an incorporated company or an individual from taxation might operate as contracts, contrary to the opinion of the State tribunals that a legislature cannot bind its successors or part with any sovereign power which has been conferred for public ends. So contracts made payable in or in consideration of the paper currency of the Confederacy have been sustained by the same tribunal, although the highest court of the State had declared them void as contrary to public policy and in obedience to the popular will as signified by a convention.¹

When, therefore, a contract is declared void by a State legislature or constitutional convention, and the State court subsequently sets it aside on the ground that it is contrary to public policy and was never valid, the Supreme Court of the United States will consider the case in both aspects and reverse the judgment if in their opinion the alleged defect does not exist, although they might have been bound by the decision of the State court had not the passage of the law enlarged their jurisdiction.²

In *Keith v. Clark*, the State of Tennessee had agreed in chartering the Bank of Tennessee to receive all its issues of circulating notes in payment of taxes; and a subsequent Constitutional amendment declaring the issues of the bank during the civil war invalid, and forbidding their receipt for taxes, was held to conflict with the Constitution of the United States.

A statute varying a grant or charter, or taking away any right which it confers, cannot be defended on the ground that the infringement is slight and does not injuriously affect the contract. The question in such cases is not one of degree, but whether the obligation is so varied as to alter the relations of the parties, or preclude a right that might have been enforced but for the change.³ A covenantee is entitled to the

¹ *Louisiana v. Pilsbury*, 105 U. S. 27; see *Keith v. Clark*, 97 Id. 454.

² *Keith v. Clark*, 97 U. S. 454.

³ See *Green v. Biddle*, 8 Wheaton, 84; *Von Hoffman v. Quincy*, 4 Wallace, 552; *Edwards v. Kearzey*, 96 U. S. 600; *Palairot's Appeal*, 67 Pa. 479, 493.

very thing for which he stipulated, and the legislature cannot substitute a different thing, although of greater value.¹

In *Palairet's Appeal* an act providing for the extinguishment of irredeemable ground-rents on the payment of a sum fixed by a jury called to estimate the value, but which was not in any case to be computed at less than twenty years' purchase, was held to be at variance with the organic laws of the State and of the General Government. "Here," said Sharswood, J., "is a perpetual covenant, personal as to the original covenantor, but running with the land, to pay an annual rent issuing out of it; and the act provides for the release of one of the parties from the performance of his contract upon the doing of a collateral act not stipulated in the contract itself. No one has ever contended that an act of assembly could authorize one of the parties to a lawful pre-existing contract to tender a collateral thing in satisfaction or extinguishment, whatever the value of that thing might be as compared with the damage occasioned by the breach. Yet in effect that is just what is done by this act. The covenant is to pay an annual sum or rent forever; a jury are authorized to say what principal sum shall be a satisfaction and extinguishment of that covenant,—a collateral thing not provided for in the contract, and which might as well be anything else as money."

¹ See *The Planters' Bank v. Sharp*, 6 Howard, 301, 307; *Palairet's Appeal*, 67 Pa. 479.

LECTURE XXXI.

The Legislature may change or regulate the Procedure as they think proper, unless the Change injuriously hinders the Creditor. — A Particular Means of Redress may be taken away if an Adequate Remedy remains or is substituted. — Laws giving an Unreasonable Stay of Execution or Exemption are Unconstitutional. — What is reasonable in View of the Circumstances is primarily for the Legislature, but their Decision may be overruled if manifestly Erroneous. — The Right of Distress may be abolished, though stipulated for in the Lease. — Is an Agreement not to take Advantage of an Actual or Prospective Stay or Exemption obligatory? — Retroactive Stay and Exemption Laws depend on the Police Power, which is ordinarily paramount. — Substitution of an Inferior though reasonably Efficient Remedy. — Legislation should not be held unconstitutional if the Case admits of a Reasonable Doubt. — Rule where the Question arises under a Prohibitory Clause. — Denying or injuriously restricting the Means of Proof impairs the Obligation. — The Legislature may retroactively abridge the Period for bringing Suit if a Reasonable Time is left.

In the cases hitherto considered, the obligation was impaired by varying the mode or time of performance, or withholding something which the contractor had agreed to give. But the Constitution may equally be violated by a statute which, without affecting the right, suspends or abrogates the remedy for the breach. If, for instance, the law were, instead of postponing the time of payment for a week, to declare that no action should be brought until a week after the debt had become due, the injury to the creditor would be the same, although inflicted in a somewhat different way. Payment would still be legally demandable at the time originally fixed, and might, if the question arose in another jurisdiction, be compelled; but as there would be no means of enforcing it in the place where the contract was made, the object which the Constitution had in view would be frustrated. And this would seem to be true irrespectively of the time during

which the delay endures. To impair is to diminish, to make less, to deteriorate; and a contract is necessarily impaired when anything is subtracted from the sum of the duties which it imposes or the rights which it confers.

If it be conceded that the suspension of the right to proceed by suit to judgment is unconstitutional, it would seem to follow that a postponement of the period at which the judgment may be enforced by execution will also be contrary to the Constitution. In neither case does the law act directly on the contract to vary the time or manner of performance and there is a delay in both which may be equivalent to a denial of justice by affording the debtor an opportunity to place his property beyond the reach of his creditors.¹

It is accordingly established that an act suspending the creditor's right to proceed to execution, or clogging it with restrictions which render it less efficient, may be equally invalid with an act postponing the period for the payment of the debt. The question arose in *Bronson v. Kinzie*² on a bill filed for the foreclosure of a mortgage which contained a stipulation that the mortgagee might enter for default of payment and dispose of the premises at public sale. The defendant relied on a statute of Illinois providing that no sale should be made compulsorily on process unless the property brought two thirds of its value as estimated by appraisers to be appointed by the court, and that the mortgagor should have a year in which to redeem, on repaying the purchase-money with interest at ten per cent.

Chief-Justice Taney said, in delivering judgment, that agreeably to the law existing when the mortgage was executed, the equity of the mortgagor might be absolutely precluded by a decree of foreclosure. If the law, though

¹ *Edwards v. Kearzey*, 96 U. S. 661, 664; *Danks v. Quackenbush*, 1 N. Y. 129; *Johnson v. Higgins*, 3 Metcalf (Ky.), 567; *Wood v. Wood*, 13 Richardson, 408; *Johnson v. Duncan*, 3 Martin (La.), 530; *Webster v. Rose*, 6 Heiskell, 93, 102; *Jacobs v. Smallwood*, 63 N. C. 112; *Hudspath v. Davis*, 41 Ala. 389; *Lester v. Hunter*, 30 Texas, 688; *Taylor v. Stearns*, 18 Grattan, 242, 288.

² 1 Howard, 317.

subsequent, had simply changed the remedy, it would be liable to no constitutional objection. A State might clearly regulate at pleasure the mode of procedure in reference to past contracts as well as future. It might, for example, shorten the period within which claims would be barred by the statute of limitations; it might even direct that necessary implements of agriculture, the tools of the mechanic, or articles which, like wearing apparel and household furniture, are needful for the daily wants of life, should be exempt from levy and sale for debt.

New remedies might be substituted, and if these were less convenient, or rendered the recovery more tardy or difficult, it did not follow that the law was unconstitutional. Whatever belonged merely to the remedy might be altered at the will of the State, provided the obligation of the contract was not impaired. If that effect was produced, it was immaterial whether it resulted from a law acting on the remedy, or directly on the contract. In either case it was prohibited by the Constitution. As the law stood when the contract before the court was made, the mortgagee was entitled on default to obtain an order for the sale of the mortgaged property free and discharged from the equitable interest of the mortgagor. This was the obligation of the contract, and any subsequent law impairing the right which it conferred was necessarily invalid.

The question presented by the second point was equally clear. Though the statute apparently acted upon the remedy, and not directly upon the contract, its effect was to deprive the complainant of his pre-existing right to foreclose the mortgage by a sale of the premises, and to impose conditions that would render any sale impracticable. The unconstitutionality was the more glaring because the mortgage contained a covenant authorizing the mortgagee, in default of payment, to sell the premises at public auction for the payment of the debt, which was rendered nugatory by the law. Mortgages made after the passage of the law might be regulated by it, because a State had the power to prescribe the equitable and legal effect of contracts thereafter made

within its jurisdiction. It might exempt any property it saw proper from sale for the payment of debts; it might impose such conditions and restrictions on the creditor as the judgment and policy of the legislature dictated. All future contracts would be subject to the conditions so imposed, and they would be obligatory on the parties in the courts of the United States as well as in those of the State. But antecedent contracts could not be impaired by retroactive legislation consistently with the Constitution of the United States.

Laws authorizing the debtor to redeem after a judicial sale were in like manner held invalid in *Scobey v. Gibson*¹ and *Iglehart v. Wolfen*.²

In the subsequent case of *McCracken v. Hayward*,³ the controversy arose under a retroactive enactment that property should not be sold on execution for less than two thirds of its appraised value. The court held that the obligation of a contract consisted in its binding force on the party who made it. This depended on the laws existing when it was made. They were the measure of the obligation incurred by one party and of the right acquired by the other. A subsequent law affecting to diminish the duty or impair the right bore on the obligation, and any law which in its operation amounted to a denial or obstruction of the right, though professing to act only on the remedy, was obnoxious to the prohibition of the Constitution. The obligation of the defendant in the case before the court was to perform the agreement; and if he made default, the plaintiff was entitled to bring suit and obtain damages for the breach and proceed by execution until the judgment was satisfied in accordance with the then existing law. This right was in every respect binding on the defendant, and as much a part of the contract as if it had been set forth in terms. Any law which denied or obstructed the right by superadding a condition that the mortgaged premises should not be sold for less than their value as ascertained by appraisement or by any other method than a public sale, impaired the obligation of the contract because it could

¹ 17 Ind. 572.

² 20 Ind. 32.

³ 2 Howard, 608.

only be enforced by a sale, and the prevention of such a sale was a denial of justice.

In *Bunn v. Gorgas*,¹ a like view was taken by the Supreme Court of Pennsylvania. "It was idle to say that the law under consideration was merely a modification of the remedy. A law modifying the remedy might impair the obligation of the contract. The obligation of a contract, in the sense in which the word was used in the Constitution, is that duty of performing it which is recognized and enforced by the law; and if the law is so changed that the means of legally enforcing the duty are materially impaired, the obligation of the contract is no longer the same."

It results from these decisions that where the creditor is by the existing law entitled to proceed forthwith to an absolute sale, the legislature cannot impair this right retroactively by providing that the debtor shall be entitled to redeem from the purchaser, or that no bid shall be accepted which does not bear a certain proportion to the value as fixed by an appraisement.

It is not less clear in principle, and from the language held in *McCracken v. Heyward*, that whether the legislature postpones the period for performance, or the period at which performance can be enforced, the obligation is equally impaired, because a judgment without the right to proceed to execution is futile, and the material question as regards the creditor is not when the debt matures, but when can the debtor be obliged to pay. In *Hasbrouck v. Shipman*,² a statute exempting all persons who should enter the service of the United States from process until they were discharged was accordingly held to transgress the constitutional prohibition.

The right of the legislature to make such reasonable regulations as do not injuriously hinder or delay the creditor was conceded in *Bronson v. McKenzie*, and has been repeatedly upheld by the State tribunals; but while there is no doubt as to the existence of the right, it is not easy to define its extent, or the circumstances which admits of its exercise. In *Chadwick v. Moore*³ the distinction was declared to be be-

¹ 5 Wright, 441.

² 16 Wis. 296.

³ 8 W. & S. 49.

tween a stay of execution for a definite period, which might be valid if the delay was not unreasonable, and an indefinite suspension, which was equivalent to a denial of remedy. An enactment, that if the land did not bring two thirds of its value when offered for sale, all proceedings should be stayed for a year, was accordingly held not to impair the obligation of the contract. "The Supreme Court of the United States had not defined the rule relatively to such questions, except by declaring that no law could be valid which materially impaired the rights and interests of the creditor." Assuming this to be the criterion, the court inclined to the opinion that the act was valid.

While the right to regulate the administration of justice was reserved to and resides in the States, it must be exercised in subordination to the higher and organic law; and a statute which even for grave and well-considered reasons — such as a financial crisis or the existence of a civil war — unduly fetters or delays the creditor will be invalid as regards antecedent contracts. It may seem reasonable that the effects of a treaty should not be sacrificed by a forced sale at a period when they will not bring half their intrinsic value, or that men who enlist for the defence of their country should not be served with process while they are in the field; but it is not the bona fide and successive conventions have shown by their votes during the last hundred years that in the opinion of the people whom they represent such a legislative discretion cannot be accorded without liability to abuse.¹ In *Bunn v. Gorgas*,² already cited, the stress of the Rebellion was held not to vary the rule or authorize an enactment that when two thirds of the number and value of an insolvent's creditors filed an affidavit extending the time for the payment of the amounts due to them respectively, an order should be made of record that execution should issue at the suit of any creditor until the stay expired. "The vice of the statute was that it deprived the creditor of his remedy, not for any term fixed by the legislature or the courts, but as long as a majority of

¹ See *Edwards v. Kearzey*, 96 U. S. 601, 604.

² 5 Wright, 441.

creditors thought fit to withhold the remedy. Their decree, once recorded, bound the judgment-creditor, although the debtor paid off the creditors who made the decree. There could be no doubt that such legislation materially impaired the obligation of the contract, and was a plain disregard of the provisions of the Federal and State Constitutions, which guard the inviolability of contracts."

In *Breitenbach v. Bush*,¹ a law made in the same year and presenting a like question was held to fall on the other side of the line. The language was as follows: "No civil process shall issue or be enforced against any person mustered into the service of this State or the United States during the term for which he shall be engaged in such service, nor until thirty days after he shall have been discharged therefrom; provided that the operation of all statutes of limitation shall be suspended upon all claims against such persons during such term." The court held that as the delay was limited to the term of service, and could not exceed three years, it was not within the rule laid down in *Bunn v. Gorgas*. A stay for a reasonable time was constitutional, although an indefinite stay was not; and in determining what length of time was reasonable, due regard might be had to circumstances which concerned the community as a whole,² and some indulgence shown to men who, during invasion or insurrection, left their homes and business for the defence of their country and in obedience to her command. Such questions were in the first instance for the legislature; but their determination would be reconsidered and set aside by the judiciary if plainly contrary to the constitutional injunction that the obligation of contracts shall not be impaired. A like decision was made in *McCormack v. Rush*;³ but both may be thought to stand on higher ground as regards patriotism and humanity than constitutional law.⁴

If the effect is produced, it matters not by what means;

¹ 8 Wright, 313.

² See *Terry v. Anderson*, 95 U. S. 632.

³ 3 Am. Law Register, N. S. 91.

⁴ *Edwards v. Kearzey*, 96 U. S. 600, 604.

and a law closing the courts for an unreasonable period, or forbidding them to proceed to judgment, is invalid whenever it frustrates a constitutional prohibition by taking away the only means by which it can be enforced.¹ All the authorities agree that when the obligation of the grant or contract is in fact impaired, the objection cannot be met by saying that the statute which works the wrong is a regulation of the remedy and does not touch the right. The right and the remedy are so far inseparable that any legislation which impairs the one must necessarily be prejudicial to the other. Laws which so change the nature and operation of existing remedies as materially to hinder or postpone the right are therefore as much a violation of the Constitution as if the right itself were denied.² Hence when there is but one remedy, or only one that is efficient, it cannot be abrogated without substituting another which will adequately protect the creditor.

Agreeably to the law of Pennsylvania as it stood in 1850, the track or franchises of a railroad or canal company could not be taken in execution and sold for the payment of its debts, and the sole means of compelling payment was a sequestration; and an enactment that such a writ should not issue unless the court was satisfied that the corporation had been guilty of mismanagement or neglect, was held to impair the obligation of antecedent contracts by clogging the only remedy by which it could effectually be enforced.³ So when a municipality is authorized by statute to issue bonds and provide the means of payment by taxation, one who lends money on the faith of the existing laws may compel the corporation to levy the requisite amount although the statute has been repealed, or, what comes to the same thing, annulled retroactively by a judicial decision.⁴

¹ *Johnson v. Higgins*, 3 Metcalf (Ky.), 567; *Wood v. Wood*, 14 Richardson, 148; *Coffman v. The Bank*, 40 Miss. 29; *Hill v. Boyland*, 40 Id. 618.

² *Green v. Biddle*, 8 Wheaton, 1; *Louisiana v. New Orleans*, 102 U. S. 203, 206; *Seibert v. Lewis*, 122 Id. 284, 295.

³ *Penrose v. The Erie Canal Co.*, 56 Pa. 46.

⁴ *Von Hoffman v. The City of Quincy*, 4 Wallace, 535; *Butz v. The City of Muscatine*, 8 Id. 583. "If the remedy be taken away, the con-

It is not less true conversely that the abrogation of a remedy will not impair the obligation if other and sufficient means of redress exist or are given in its stead. The debtor's person may be exempted from arrest if the right to take his property in execution remains intact,¹ and statutes abolishing imprisonment for debt may consequently retroact on prior contracts.² For as the motive for confining the debtor is not, agreeably to the view taken in modern times, punishment, but to compel the application of his assets to the discharge of his liabilities, the creditor is not prejudiced so long as he can effect the object by other means.

tract is in effect annulled. Nothing is left of it of any value to the party whose rights are thus invaded. This subject was fully considered in *Von Hoffman v. The City of Quincy*, 4 Wallace, 557. It was there held that laws for the collection of the requisite taxes existing when the bonds were issued, and subsequently repealed, still subsisted for the purposes of the contract, and that a writ of mandamus might issue from the circuit court to enforce them. Here the remedy is taken away, not by a subsequent repeal, but by subsequent judicial decisions. The effect upon the contract is the same as if the provisions of the code had been repealed. This court construes all contracts brought before it for consideration, and in doing so its action is independent of that of the State courts, which may have exercised their judgment upon the same subject. *Swift v. Tyson*, 16 Peters, 19. This is one of the functions we are called upon to perform in this case. The fact that one of the elements in the case is a statute of the State does not affect the legal result. We are of the opinion that under the statutes of Iowa in force when the contract was made, the relator is entitled to the remedy he asks, and that this right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by one than the other. We cannot in any other way give effect to the contract of the parties as we understand it. This contract was entered into in 1854. The earliest of the adjudications to which we have referred was made in 1862. If the construction ultimately given to the statute had preceded the issuing of the bonds, and become the settled law of the State before that time, the case, as regards this point, would have presented a different aspect." *Jefferson Branch of the State Bank v. Skelly*, 1 Black, 436.

¹ *Mason v. Haile*, 12 Wheaton, 370; *Beers v. Haughton*, 9 Peters, 359; *Donnelly v. Corbett*, 3 Seld. 500.

² *Penniman's Case*, 103 U. S. 714.

In *Van Rensselaer v. Kryder*,¹ and *Conkey v. Hart*,² a law abrogating the right of distress for rent was in like manner held applicable to existing leases as well as to those made after the passage of the statute. The landlord could still proceed to judgment and execution, and merely lost a summary means of attaining an end which might still be reached in other ways.

In determining this point the court came to the more questionable conclusion that it mattered not that the lease contained a covenant authorizing the landlord to enter and distrain. Johnson, J., said that had it clearly been the intention of the parties to preserve the right of distress, although the legislature should see fit to abolish it, the subject was one over which the citizen had no control, or none that should be allowed to supersede the sovereign power of the State. If the parties could stipulate for a particular remedy, and their agreement would, by virtue of the Constitution of the United States, supersede the authority of the legislature, whatever existed at any time as part of the remedial law might be perpetuated as it regarded any number of persons who chose so to agree.

A stipulation that a creditor shall be entitled to levy on all the debtor's property, whether it is or is not legally exempt, is viewed in like manner by the same tribunal as an attempt to substitute the will of the parties for that of the legislature, in a matter where the latter should be supreme, which is nugatory as regards the existing law and relatively to subsequent enactments.³

A different conclusion has been reached in Pennsylvania, where stay and execution laws are held to be within the rule *quilibet potest renunciare juri pro se introducto*; ⁴ and one who agrees that the whole of his property shall be answerable for his debts, or that judgment may be entered against him without stay of execution, will be bound by his undertaking, notwithstanding a subsequent enactment that no

¹ 3 Kernan, 299.

² *Knettle v. Newcomb*, 22 N. Y. 249.

³ 4 Id. 22.

⁴ *Broom's Legal Maxims*, 309; 48 Law Lib. 200.

such waiver shall be valid.¹ In *Bilmeyer v. Evans*, a provision in a warrant of attorney to confess judgment, that there should be no stay of execution after the day named for payment, was held to be a part of the contract, which could not be annulled retroactively by an act of assembly. "If," said Woodward, J., "the thing provided for by the legislature be within their general competence, and yet be the very thing expressly excluded by a particular contract, it is plain that, as to the parties to that contract, the law is unconstitutional and void, because it impairs the obligation of their contract; nor do you rescue the law from this consequence by calling it remedial. The legislature can no more subvert the lawful contracts of parties under the guise of remedial legislation, than by a direct assault. They can pass no law that impairs the obligation of contracts. Exemption statutes illustrate this whole subject. What portion of a man's property shall be liable for his debts, and what shall be exempt, is a fair subject of legislative discretion. Manifestly, exemption statutes are regulations of the creditor's remedies against the debtor's property; they are therefore constitutional. But in a particular contract the debtor stipulates that he will have no exemption, and devotes all of his property to the payment of his debts. Now, whilst he cannot repeal the law by his agreement, he can refuse its favors. His contract is lawful and binding. His waiver of legal rights has become parcel of the obligation of his contract, and the legislature can no more impair that obligation than they can annul the entire contract."

In considering the question, it is necessary to discriminate between an undertaking that a particular remedy—as, for instance, a *feri facias*—shall subsist as a means of enforcing a contract, and an undertaking that the debtor will not apply for a stay of execution, or withdraw any portion of his property from the operation of the writ. In the latter case, the party covenants for himself; in the former, he seeks

¹ *McKinney v. McKinney*, 6 Watts, 34; *Case v. Dunmore*, 11 Harris, 93; *Bowman v. Smiley*, 7 Casey, 225; *Bilmeyer v. Evans*, 4 Wright, 324; *Lewis v. Lewis*, 47 Pa. 127.

to control the legislature. So the right of distress is, in its strict and technical sense, an authority given by the law, which cannot be kept alive by agreement after it has been recalled by a statute; but a stipulation that a creditor shall be entitled to enter and take such goods and chattels as he can find in a house, factory, or other building belonging to the debtor, and appropriate them in payment of arrears of rent, or a demand of any other kind, confers a power, arising *ex contractu*, which can neither be revoked by the donor, nor abrogated legislatively.¹ The distinction is the more obvious because such a contract only covers the tenant's goods, and does not, like the common law power, justify the seizure of the property of a third person, though found on the premises.

There is another aspect of the question. Is such legislation an exercise of the police power for the general good, or does it simply confer a privilege which the debtor may waive at pleasure? It has been plausibly contended that exemption laws have their foundation in the duty of protecting men against the consequences of their own improvidence, which forbids usurious and exorbitant rates of interest, or the creation of a mortgage without power to redeem. Every one, it has been said, may dispense with rules made solely for his benefit, but not with those which concern the community as a whole. When, therefore, the legislature provides, through motives of humanity, that certain articles of prime necessity may be reserved for the debtor's use, he should not be allowed to frustrate the beneficial operation of the statute. It is not enough to say that he should be free to choose in a matter which so nearly concerns himself, because experience shows that men under the pressure of want are apt to sacrifice the future for present ease, and honest debtors do not look forward to a default in payment which will render them liable to an execution, and are therefore ready to consent that no part of their property shall be exempt, should such a contingency occur.

¹ 2 Leading Cases in Equity (4 Am. ed.), 1618; *Congreve v. Ebbitts*, 10 Exch. 298; *Moody v. Wright*, 13 Metcalf, 17, 32.

A debtor may no doubt forego the right to exemption when the time arrives, as a mortgagor may release the equity of redemption; but a prospective agreement to that effect is void in the latter case, and may be deemed questionable in the former.¹

Whatever the true view may be in such cases, it is clear that a right or power conferred in terms, or resulting from the nature of the contract, cannot be taken away on the plea that other and adequate remedies remain. A mortgagee is, for instance, entitled to enter and take the rents and profits, by virtue of his ownership of the legal title, without waiting until the mortgagor is in default;² and a law which abrogates this right will not be less unconstitutional because he may still bring suit for the debt, or proceed to a foreclosure.³ A clause in a mortgage of land or chattels authorizing the mortgagee to take possession in default of payment and proceed to a public or private sale is an integral part of the contract which the legislature may not impair; and any attempt on their part to hinder or postpone the exercise of the power thus conferred will fail.⁴ So the right of the mortgagor to redeem cannot be taken away retroactively by the legislature, although they may abridge the period within which it may be exercised.⁵

The obligation of a contract may also be impaired by a law withdrawing the property of the debtor from execution, or placing it in any other way beyond the reach of the creditor.⁶ In *Curran v. The Bank of Arkansas* the legislature of Arkansas chartered a bank, and the State contributed the entire capital, there being no other party interested. The bank

¹ *Stafford v. Elliott*, 59 Ga. 837; *Green v. Watson*, 75 Id. 471; *Phelps v. Phelps*, 72 Ill. 545; *Recht v. Kelly*, 82 Id. 148; *Curtis v. O'Brien*, 20 Iowa, 376; *Maxwell v. Reed*, 7 Wis. 582.

² 1 *Smith's Leading Cases* (8 Am. ed.), 917.

³ *Mundy v. Munroe*, 1 Mich. 76; *Blackwood v. Van Vliet*, 11 Id. 252.

⁴ *Borie v. Borie*, 27 Minn. 371; *Taylor v. Stearns*, 18 Grattan, 244; *Bronson v. Kinzie*, 1 Howard, 317. See *ante*, p. 690.

⁵ *Robinson v. Howe*, 18 Wis. 346; *Butler v. Palmer*, 1 Hill, 324; *Cogell v. Power*, 1 Mich. 869.

⁶ *Curran v. The Bank of Arkansas*, 15 Howard, 304.

failed, and a statute was passed providing that the bonds of the State should be received in payment of debts due to the bank, and appropriating its assets to repay the amount advanced by the State. The Supreme Court held that as the State was the sole stockholder, the charter was an agency, and not a contract in the sense of the Constitution of the United States; but that a principal could not, by revoking the authority of his agent, invalidate the contracts which had been made while it was still in force. The assets of the bank were subject to a trust for its creditors, who had a right of priority which entitled them to a preference over its stockholders; and this principle was not less applicable because the entire stock belonged to the State. The legislature might repeal the charter, but the trust would remain, and would be enforced by a court of equity. It followed that the State of Arkansas could neither take the property of the bank to satisfy its demand, nor compel the bank to receive its bonds in payment.

It seems, nevertheless, to be generally conceded, both in the State courts and by the Supreme Court of the United States, that the necessary implements of agriculture, the tools of a mechanic, or articles needful for household use, such as stoves, bedding, or wearing apparel, may be exempted from execution by a law passed after the period at which the obligation was contracted,¹ although the debtor has no other property, and the effect is entirely to frustrate the creditor.

It is not easy to reconcile such a result with the doctrine that whatever impairs the remedy impairs the right. If the legislature can determine finally what and how much of the debtor's property shall be exempt, it may so restrict the remedy as to render it practically unavailing. If, on the other hand, the ultimate determination rests with the judiciary, by what rule are they to be guided in revising the decision

¹ See *Quackenbush v. Danks*, 1 Denio, 128; 1 *Comstock*, 129; *Morse v. Goold*, 1 Kernan, 281; *Rockwell v. Hubbell*, 2 Douglas (Mich.), 288; *Edwards v. Kearzey*, 96 U. S. 661; *Bronson v. Kinzie*, 1 Howard, 311; *McCracken v. Hayward*, 2 Id. 608.

of the legislature? The most satisfactory answer to these queries is, as already suggested, that such legislation should be regarded as an exercise of the police power in obedience to the dictate of humanity that the debtor shall not be deprived of the things which are indispensable to existence; and should they transcend these limits, the error may be rectified by the courts.¹

Logical as seems the inference that, since laws postponing the period of performance, and laws postponing the period when performance can be enforced, tend to the same result, they should be classed in the same category, there are other considerations that lead to a different conclusion, which is sustained by a large and increasing array of authorities. Procedure, including the manner of bringing suit, the steps to be taken during the progress of the cause, the form and effect of judgments, and the writs whereby they are carried into execution, is under the control of the legislature, who may modify it by substituting new methods, which, though dilatory and less effectual than those previously in use, still afford a substantial means of redress.²

What alterations are expedient and admissible, is necessarily in the first instance for the body which enacts the law; and although their decision is not conclusive on the judiciary, it should not be set aside unless it is clearly unwarranted by the circumstances and inconsistent with the constitutional prohibition.³ Whenever a discretionary power is granted to

¹ *Hawthorne v. Calef*, 2 Wallace, 10.

² *Tennessee v. Sneed*, 96 U. S. 69; *Railroad Co. v. Hecht*, 95 Id. 168; *Bronson v. Kinzie*, 1 Howard, 311, 315; *Penniman v. United States*, 103 Id. 714; *Antoni v. Greenhow*, 107 U. S. 766; *Templeton v. Horne*, 82 Ill. 492; *Evans v. Montgomery*, 4 W. & S. 220; *Long's Appeal*, 87 Pa. 114; *Oriental Bank v. Freese*, 18 Me. 109; *Bigelow v. Pritchard*, 21 Pick. 109; *Morse v. Gould*, 11 N. Y. 281, 287; *Johnson v. Higgins*, 3 Met. (Ky.), 567; *Barkley v. Glover*, 4 Id. 44.

³ *Sturges v. Crowninshield*, 4 Wheaton, 122, 200; *Tennessee v. Sneed*, 96 U. S. 69; *Antoni v. Greenhow*, 107 Id. 766; *Jackson v. Lampshire*, 3 Peters, 280; Professor Thayer's article on Legal Tender, *Harvard Law Review*, May, 1887, p. 92; *Johnson v. Higgins*, 3 Met. (Ky.), 567; *Eames v. Savage*, 71 Me. 342; *Sears v. Cottrell*, 5 Mich. 251.

a department of the government, there is a presumption that it has been duly exercised, which should not be lightly disregarded;¹ or, as the principle is sometimes stated, to justify a judicial declaration that legislation is unconstitutional the fact must be "plain beyond a reasonable doubt."² And as the line between modifications which do and those which do not impair the obligation has not been definitely ascertained, it is not surprising that opposite conclusions should be drawn from premises which are in the main analogous.³

Statutes according a stay of execution retroactively to the debtor, or abridging the period within which the creditor may sue, are within the principle, because the question is one of reasonable time;⁴ although even here the courts will not allow a manifestly injurious law to stand.⁵ But the legislature has no such discretion as regards the consideration of the contract or the time or mode of performance. Here the bounds are fixed by the agreement of the parties and the constitutional prohibition, and the smallest alteration is as inadmissible as the greatest.⁶ If they are overpassed, the conclusion reached by the legislative department of the government counts for nothing,⁷ and the duty of the judiciary is plain. The substitution of a tardy and inefficacious remedy for one which affords an adequate measure of redress does not, it seems, fall within this principle, because

¹ *Terry v. Anderson*, 95 U. S. 628.

² *Ogden v. Saunders*, 12 Wheaton, 213, 270; *Sinking-Fund Cases*, 99 U. S. 718; *Autoni v. Greenhow*, 107 Id. 766; *People v. Orange*, 17 N. Y. 241.

³ *Von Hoffman v. Quincy*, 4 Wallace, 535; *Black on Constitutional Prohibitions*, sections 134, 136. See and contrast the language held in *Kring v. Missouri*, 107 U. S. 221, and *Edwards v. Kearzey*, 96 Id. 601, 604, with the dicta in *Antoni v. Greenhow*.

⁴ See *Jackson v. Lampshire*, 3 Peters 280; *Koshkoning v. Burton*, 104 U. S. 668; *Terry v. Anderson*, 95 Id. 628.

⁵ *Osborn v. Jaines*, 17 Wis. 593; *Berry v. Randall*, 4 Met. (Ky.), 292; *Edwards v. Kearzey*, 96 U. S. 601; *Hudspath v. Davis*, 41 Ala. 389; *Jacobs v. Smallwood*, 63 N. C. 112.

⁶ See *ante*, p. 678.

⁷ See *Edwards v. Kearzey*, 96 U. S. 601, 604; *Merchants' Bank v. State Bank*, 10 Wallace, 604.

the legislature are entitled to alter the course of procedure, and must determine in the first instance how the power shall be exercised. If it be urged that the question is here legal, as arising from the relation between admitted facts, the remark is unanswerable,¹ and yet, agreeably to many authorities, the change cannot be pronounced invalid unless the new method is not only inferior to the old, but so insufficient as to leave the obligation to fulfil the contract without any effectual sanction.² As the law now stands, persons who have mutual demands may each give the amount due him in evidence as a defence to a suit brought by the other. This remedy where the plaintiff is insolvent, or cannot be reached by process, may be the only one through which the defendant can obtain redress. And yet it might seemingly be repealed both as regards past and future contracts, and one or both of the parties put to the expense, uncertainty, and delay of a cross-action. Such, at least, would seem to be the view taken in a recent case of great authority; and it may be inferred from the same decision that such a course is not unconstitutional even when the plaintiff has covenanted that the sum due to the defendant shall be received in payment of the amount which he owes.³

The doctrine that an adequate remedy may be substituted for that originally given, although it is dilatory and involves an outlay which the creditor may be unable to afford, was carried in the case above cited to a length which may seem extreme. Coupon-bonds were issued by Virginia in 1873 with a provision that the coupons should be taken for taxes; and it was held by the courts of last resort that the contract took effect in favor of every one to whom the coupons were transferred, and that the tax-collectors were as much bound to accept them from such persons as from the first holders of the bonds.⁴ It was subsequently enacted, with

¹ See *Louisiana v. New Orleans*, 102 U. S. 203, 206; *Seibert v. Lewis*, 122 Id. 284, 295.

² *Morse v. Gould*, 11 N. Y. 281, 287.

³ See *Antoni v. Greenhow*, 107 U. S. 766.

⁴ See *ante*, p. 586; also *Hartman v. Greenhow*, 102 U. S. 672; 114 Id. 270.

the professed object of preventing fraud, that when the coupons were tendered, the collector should accept them, give a receipt, and require payment in money; and the tax-payer might then file his petition in the Hustings Court and have a jury impanelled to determine his right to the coupons, and whether they were spurious. If the verdict went in his favor, the amount which he had paid for the tax was to be refunded out of the first money in the treasury, in preference to all other claims. It was contended for the coupon-holders that the statute, though favored by a political party which professed to cherish public credit, was a device to cover a breach of faith, and contrary to the constitutional prohibition which guards the sanctity of contracts. The prompt and effectual remedy under *Hartman v. Greenhow* against the tax-collector was taken away, and the creditors were compelled to look for their money to the State, and if she chose to withhold it, might be unable to obtain redress. The statute moreover contravened the rule by substituting a different means of payment for that which the State had agreed to accept, and impaired the obligation of the contract.¹ It was however sustained in the Supreme Court of the United States, in opposition to the opinion of Field and Harlan, JJ., who contended that the remedy was so obstructed as to impair the right.²

¹ *Wilmington R. R. Co. v. King*, 91 U. S. 3; *Dundas v. Bowler*, 3 McLean, 397.

² *Antoni v. Greenhow*, 107 U. S. 766; see Black, *Constitutional Prohibitions*, section 86

“It cannot be denied that as a general rule, laws applicable to the case which are in force at the time and place of making a contract, enter into and form part of the contract itself, and ‘that this embraces alike those laws which affect its validity, construction, discharge, and enforcement.’ *Walker v. Whitehead*, 16 Wallace, 314, 317. But it is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract if an adequate and efficacious remedy is left. This limitation upon the prohibitory clause of the Constitution in respect to the legislative power of the States over the obligation of contracts was suggested by Chief-Justice Marshall in *Sturges v. Crowninshield*, 4 Wheaton, 122, and has been uniformly acted on since. *Mason v. Haile*, 12 Wheaton, 370; *Bronson v. Kinzie*, 1 Howard,

While such is the view taken in some instances, exemption and stay-laws have been held in others, of equal weight, to be as much within the Constitutional prohibition as laws operating directly on the contract to vary its terms, and not to afford room for the exercise of a discretionary power. When the organic law provides that a thing shall not be done, and it is done, the case does not admit of a reasonable doubt. Laws postponing the period of payment or lessening the amount due, are consequently unconstitutional; and the

311; *Von Hoffman v. City of Quincy*, 4 Wallace, 535; *Drehman v. Stifle*, 8 Id. 314; *Terry v. Anderson*, 95 U. S. 628; *Tennessee v. Sneed*, 96 Id. 69; *Louisiana v. Pilsbury*, 105 Id. 278. As was very properly said by Mr. Justice Swayne in *Von Hoffman v. City of Quincy*, *ubi supra*: 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution, and to that extent void,' p. 553. In all such cases the question becomes, therefore, one of reasonableness, and of that the legislature is primarily the judge, *Jackson v. Lampshire*, 3 Pet. 280; *Terry v. Anderson*, *ubi supra*. We ought never to overrule the decision of the legislative department of the government unless a palpable error has been committed. If a state of facts could exist that would justify the change in a remedy which has been made, we must presume it did exist, and that the law was passed on that account. *Munn v. Illinois*, 94 U. S. 113. We have nothing to do with the motives of the legislature, if what they do is within the scope of their powers under the Constitution." *Antoni v. Greenhow*, 107 U. S.

The proposition that "if any state of facts could exist" (as, for instance, invasion or rebellion) "that would justify a change which hinders and delays the creditor, the court must presume that it does exist," instead of viewing the statute in the light of the actual state of things, is novel, and would justify the grant of a stay of execution for three years to every man who enters the military service of the United States in time of peace, because such a delay might be justifiable if the country were at war.

Whoever reads the dicta of the Supreme Court of the United States on this important subject, as contrasted in Black on Constitutional Prohibitions, sections 133-136, will be convinced that if not irreconcilable, they look both ways, or relate to the different sides of the shield.

effect is the same when the creditor is delayed in proceeding to judgment or execution.¹ An indefinite stay of execution is necessarily invalid, whatever may be the circumstances which led to its enactment;² and in *Webster v. Rose*³ a stay for one year, on giving security for payment when the time expired, was held equally invalid. A like view has been taken of acts precluding mortgagees from proceeding on the bond until they have exhausted the remedy on the mortgage.⁴

Stay-laws were also pointedly condemned in North Carolina;⁵ and when the same court sustained a law retroactively withdrawing a large amount of the debtor's property from execution, the decision was reversed by the national court of last resort on the ground that there is no valid distinction between postponing the period at which judgment can be rendered, and restricting the operation of the remedy when obtained.⁶ When the facts are undisputed, it is the duty of the court to declare the law, without deferring to the view taken by the legislature. *Qui serius solvit, minus solvit*; and it is also true that enabling the debtor to withhold his property from the creditor lessens the obligation. The dicta of Chief-Justice Taney in *Bronson v. Kinzie*,⁷ were dismissed by saying "the learned Chief-Justice seems to have had in his mind the maxim *de minimis*, etc. Upon no other ground can any exemption be justified. 'Policy and humanity' are dangerous guides in the discussion of a legal proposition. He who follows them far is apt to bring back the means of error and delusion. The prohibition contains no qualification,

¹ *Webster v. Rose*, 6 Heiskell, 93, 102; *Hudspeth v. Davis*, 41 Ala. 389; *Johnson v. Duncan*, 3 Martin (La.), 530

² *Williams's Appeal*, 72 Pa. 214, 219; *Barnes v. Barnes*, 8 N. C. 366; *Johnson v. Higgins*, 3 Metcalf (Ky.), 567; *Hudspeth v. Davis*, 41 Ala. 387.

³ 6 Heiskell, 93.

⁴ *Baldwin v. Flagg*, 43 N. J. Law, 497-503.

⁵ *Jacobs v. Smallwood*, 63 N. C. 385; *Barnes v. Barnes*, 8 Jones (N. C. Law), 366.

⁶ *Edwards v. Kearzey*, 96 U. S. 601.

⁷ See *ante*, p. 691.

and we have no judicial authority to interpolate any. Our duty is simply to execute it."¹

In *Seibert v. Lewis*,² the question grew, as in *Antoni v. Greenhow*, out of the substitution of an inferior remedy, which, if susceptible of being used efficiently, was yet clogged with conditions tending to hinder and delay the creditor;

¹ "It is the established law of North Carolina that stay-laws are void because they are in conflict with the national Constitution. *Jacobs v. Smallwood*, 63 N. C. 112; *Jones v. Crittenden*, 1 Law Repos. N. C. 385; *Barnes v. Barnes et al.*, 8 Jones (N. C. Law), 366. This ruling is clearly correct. Such laws change a term of the contract by postponing the time of payment. This impairs its obligation, by making it less valuable to the creditor. But it does this solely by operating on the remedy. The contract is not otherwise touched by the offending law. Let us suppose a case. A party recovers two judgments, one against A, the other against B, each for the sum of \$1,500 upon a promissory note. Each debtor has property worth the amount of the judgment, and no more. The legislature thereafter passes a law declaring that all past and future judgments shall be collected 'in four equal annual instalments.' At the same time another law is passed, which exempts from execution the debtor's property to the amount of \$1,500. The court holds the former law void, and the latter valid. Is not such a result a legal solecism? Can the two judgments be reconciled? One law postpones the remedy, the other destroys it, except in the contingency that the debtor shall acquire more property, — a thing that may not occur, and that cannot occur if he die before the acquisition is made. Both laws involve the same principle and rest on the same basis. They must stand or fall together. The concession that the former is invalid cuts away the foundation from under the latter. If a State may stay the remedy for one fixed period, however short, it may for another, however long. And if it may exempt property to the amount here in question, it may do so to any amount. This, as regards the mode of impairment we are considering, would annul the inhibition of the Constitution, and set at nought the salutary restriction it was intended to impose." *Edwards v. Kearzey*, 96 U. S. 601, 604.

It seems proper to add that in this as in nearly all the instances where stay and exemption laws have been held invalid, the debtor was not merely indulged at the expense of the creditor, but to an extent which manifestly impaired the obligation; and the question whether such favors may be constitutional when reasonable in extent and dictated by policy and humanity may, notwithstanding the language held in *Edwards v. Kearzey*, be considered as still open in the court of last resort. (See *Black on Constitutional Prohibitions*, section 166.)

² 122 U. S. 284.

and the court reverted to the doctrine of *Edwards v. Kezey*, "that the remedy subsisting in the State when a contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract, is forbidden by the Constitution, and is therefore void." The Missouri legislature, to facilitate the construction of railroads, enacted that the County Court should levy a special tax, in order to pay any bond which might be issued by a municipal corporation on account of its subscription to the stock of a railroad company. A subsequent statute provided that no such tax should be levied unless the Missouri Circuit Court was satisfied that it was necessary and would not be in conflict with the Constitution and laws of the State. No such action was taken in the State courts, and the Circuit Court of the United States issued a peremptory mandamus commanding the County Court to levy a tax in accordance with the law as it originally stood, to pay bonds which had been executed before the change. The tax-collector having been enjoined by the State courts not to collect the tax, and commanded by the United States Circuit Court to proceed, the cause was brought by writ of error before the court of last resort at Washington. It might seemingly have been held under these circumstances with as much reason as in *Antoni v. Greenhow*, that if a circuitous way had been substituted for the direct path which lay open to the creditor when the contract was made, that it would lead to the same result. The State courts would presumably do their duty in levying the tax; if they did not, there would be time enough for the federal courts to intervene.¹ But the Supreme Court of the United States decided that whatever legislation lessens the means by which a contract obligation can be enforced, impairs it. "If it tends to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The contract in the case under consideration was not only that the cred

¹ See *The State v. County Court, Cape Girardeau Co.*, 8 Western Reporter, 626.

should have as good a remedy as that provided by the contract when made, but that his remedy should be by means of a tax, in reference to which the levy and collection should be as efficacious as the State provided for the benefit of its counties, without any discrimination against him. In this vital point the obligation was impaired by the law under which the collector thought to justify his disobedience to the mandate of the Circuit Court." It is difficult to see that there was not as much room in this case as in *Antoni v. Greenhow* for the reasonable doubt which is said to render it the duty of the court to acquiesce in the conclusion reached by the legislature.

Whatever the rule may be under other circumstances, it is clear that when the creditor has acquired a lien by obtaining a judgment which binds the debtor's real estate, or by issuing a *fi. fa.* and levying on his personal property, a statute which divests the lien will not be less unconstitutional because the creditor may still issue another writ and take the goods at the risk of being postponed to intervening levies. Swayne, J., said: "The act withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is, in effect, taking one person's property and giving it to another without compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact."¹ This decision seems to be nearer to the intent of the Constitution than *Watson v. The New York Central R. R. Co.*,² where the lien of a judgment was declared to be subject to the control of the legislature, which might shorten or prolong its duration retroactively, or abrogate it altogether. And it was held to follow that land might be taken for public use, and compensation made to the owner, without notice to his judgment-creditors. The lien of a judgment may no doubt be abridged retroactively; but there must, as in the

¹ *Gunn v. Barry*, 15 Wallace, 610. See *Calder v. Bull*, 3 Dallas, 388.

² 47 N. Y. 157.

case of other statutes of limitation, be a sufficient time left to enforce the right before the bar goes into operation.

The inchoate lien resulting from the service of an attachment or the filing of a mechanic's claim, stands on a different footing, at all events so far as it affects the rights of third persons who are not parties to the contract under which the work was done or the demand or debt arose.¹ In this instance an act approved April 28, 1840, declared that the lien arising under the act of June 16, 1836, for work done or materials furnished for the erection of a building, should not be construed to extend to any other or greater estate than that of the persons in possession at the time of commencing the building, or at whose instance the same was built. The effect was to overrule the view previously taken by the judges that a tenant for life or years, or, as it would seem, an estranger to the title, might bind the freehold without the knowledge or consent of the owner or reversioner. Declaratory statutes cannot ordinarily retroact consistently with our organic laws; but the court held that the legislature might well repeal a statutory remedy which enabled a person to dispose of another's land for the payment of a debt contracted without the owner's participation, and of which the owner might be ignorant, until it was too late to defend the title. The explanation seems to be that the act could not impose the obligation of a contract, because none existed between the mechanic who filed, and the owner whose land was affected by the lien.

A contract will not be impaired by a law obviating a technical defence or giving a more effectual means of enforcing its fulfilment.² In *Taggart v. McGinn* a statute authorizing a recovery for rent reserved in covenant against the landlord and his assigns, whether the lease was by deed-poll, or indenture, and although he did not sign or seal, was held to be retroactively valid by virtue of this principle. In *McElrath v. The Railway Co.*, Agnew, C.-J., observed

¹ *Evans v. Montgomery*, 4 W. & S. 218.

² *Bleakney v. The Farmers' Bank*, 17 S. & R. 64; *Taggart v. McGinn*, 14 Pa. 155; *McElrath v. The Railway Co.*, 55 Id. 189.

one who is in default has no right to complain that the legislature have given an additional remedy for his breach of contract, and an order of sale was made in favor of the mortgagees of a railway under a power conferred by a statute which had been enacted subsequently to the execution of the mortgage, although it contained a clause authorizing them to enter and take the tolls if default were made in payment.

The obligation of contracts may also be impaired by denying the means of proof. The evidence, like the remedy, belongs to the law of the forum, and the States may regulate both;¹ but their power must be exercised in subordination to the Constitution of the United States, and an enactment that the deed by which land has been conveyed shall be inadmissible on behalf of the grantee, will be as invalid as a statute vacating the grant; and so of a statute of frauds applying to contracts which were not required to be in writing when made.² An act throwing a grant, which was previously indisputable, open to disproof, may fall in the same category; and where a deed executed by the sheriff, and conveying land that has been sold for taxes, was, agreeably to the existing law, conclusive that all the statutory requisites had been observed, the court held that it could not be reduced legislatively to the level of *prima facie* evidence.³ Acts which retrospectively enlarge the means of proof by rendering certified copies admissible in evidence, or curing the defective acknowledgment of a deed, are not liable to this objection, because the effect is not to impair the obligation of the grant or contract, but to facilitate the remedies by which it may be enforced.⁴

Statutes of limitation are for the greater part rules of evidence providing, in favor of the repose and safety of society, that a certain lapse of time shall give rise to an adverse pre-

¹ *Jackson v. Lampshire*, 3 Peters, 290.

² *Von Hoffman v. The City of Quincy*, 4 Wallace, 538; *Edwards v. Kearzey*, 96 U. S. 600. See *ante*, p. 678.

³ *Smith v. Cleveland*, 17 Wis. 526.

⁴ See *Foster v. Gray*, 22 Pa. 9; *Sherwood v. Adler*, 3 Wharton, 431.

sumption which cannot be overcome without a new promise or other unequivocal declaration of the debtor's purpose to waive the benefit so conferred; and as the length of this period depends upon the will of the legislature, it may be shortened at their pleasure, even as regards antecedent contracts, provided the bar is not immediate, and a reasonable time remains in which to sue.¹ If, for instance, the legislature were to provide on the 1st of March that no debts should be recoverable unless the suit was brought on or before the first of the next ensuing year, the law might be impolitic or unjust, but would not be unconstitutional.² Hence a law reducing the period of limitation retroactively from six years to three, might be valid if contracts of more than three years' standing were exempted from its operation; but a statute containing no such exception would conflict with the Constitution of the United States, by leaving rights of action dating farther back than three years without a remedy.³

¹ *Osborn v. Jaines*, 17 Wis. 577; *Terry v. Anderson*, 95 U. S. 628; *Smith v. Morrison*, 22 Pick. 430; *Peirce v. Tobey*, 5 Metcalf, 172.

² *Terry v. Anderson*, 95 U. S. 632; *Kenyon v. Stewart*, 44 Pa. 180; *Folmar's Appeal*, 68 Id. 482; *Korn v. Browne*, 64 Id. 55.

³ *Osborn v. Jaines*, 17 Wis. 573; *Pearce v. Patton*, 7 B. Monroe, 162; *Berry v. Randall*, 4 Metcalf (Ky.), 292; *Mitchell v. Clark*, 110 U. S. 636, 643; *State v. Jones*, 21 Md. 432; *Willard v. Harvey*, 24 N. H. 344; *Morris v. Carter*, 46 N. J. Law, 260. The principle which governs in such cases is stated in the following citation from *Terry v. Anderson*, 95 U. S. 632:—

“This court has often decided that statutes of limitation affecting existing rights are not unconstitutional if a reasonable time is given for the commencement of an action before the bar takes place. *Hawkins v. Barney*, 5 Peters, 451; *Jackson v. Lampshire*, 3 Id. 280; *Sohn v. Waterson*, 17 Wallace, 596; *Christmas v. Russell*, 5 Id. 290; *Sturges v. Crowninshield*, 4 Wheaton, 122. It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed, than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may

In like manner, a statute providing that antecedent grants shall be postponed if not recorded, may be valid if giving the grantee sufficient time to register his deed, but will be void if the effect is necessarily to invalidate the grant.¹ In *Jackson v. Lampshire*² "it was accordingly declared to be within the undoubted power of the State legislatures to pass recording acts postponing the elder grantee to the younger, if the deed was not recorded within the proper time; and the power is the same whether the instrument is executed before or after the passage of the recording act. Such laws are analogous to statutes of limitation,

change them at its discretion, provided adequate means of enforcing the right remain. In all such cases the question is one of reasonableness, and we have therefore only to consider whether the time allowed in this statute is, under all the circumstances, reasonable. Of that the legislature is primarily the judge; and we cannot overrule the decision of that department of the government, unless a palpable error has been committed. In judging of that, we must place ourselves in the position of the legislators, and must measure the time of limitation in the midst of the circumstances which surrounded them, as nearly as possible; for what is reasonable in a particular case depends upon its particular facts. Here, nine months and seventeen days were given to sue upon a cause of action which had already been running nearly four years or more. . . . The liability to be enforced was that of a stockholder, under an act of incorporation, for the ultimate redemption of the bills of a bank swept away by the disasters of a civil war which had involved nearly all of the people of the State in heavy pecuniary misfortunes. . . . The business interests of the entire people of the State had been overwhelmed by a calamity common to all. . . . This clearly presented a case for legislative interference within the just influence of constitutional limitations. For this purpose the obligations of old contracts could not be impaired, but their prompt enforcement could be insisted upon, or an abandonment claimed. That, as we think, was done here, and no more. At any rate, there has not been such an abuse of legislative power as to justify judicial interference. As was said in *Jackson v. Lampshire*, *supra*, 'The time and manner of their operation [statutes of limitation], the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend upon the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment.' "

¹ *Vance v. Vance*, 108 U. S. 514, 518; *Curtis v. Whitney*, 13 Wallace, 68. See *Priestly v. Watkins*, 62 Miss. 798.

² 3 Peters, 290.

and like them do not impair the obligation of the contract. The time and manner of their operation, the exceptions to them, and the conditions under which they are to take effect, depend in general on the discretion of the legislature. Cases may occur where the provisions of such a law are so unreasonable as to be an annihilation of the right; but the case before the court is not one of them." So the legislature may require mortgages to be registered, though no such rule was in force when they were executed, and provide that they shall be invalid against purchasers without notice if the condition be not fulfilled.¹

In *Kenyon v. Stewart*² the Supreme Court of Pennsylvania cited *Jackson v. Lampshire* as showing incontestably that a State might retroactively abridge the period within which the probate of a devise of real estate could be controverted in an ejectment brought for the land.

The rule holds good after judgment,³ and in *McElmoyle v. Cohen* a statute limiting the right of action on the judgments of other States to five years after they were pronounced, was held not to impair the obligation of the contract, or violate the constitutional provisions that such judgments "shall have full faith and credit." In the *Bank of Alabama v. Dalton*,⁴ an act of the Mississippi legislature providing that suit should not be brought on the judgments of other States after the lapse of two years, was held to be a defence, although the debtor had moved into Alabama after the period of limitation had expired, with a view to getting rid of his liability. The decision went on the ground that a State may regulate antecedent contracts, as well as subsequent, so long as it does not impair the obligation, and that while Congress could, agreeably to the Constitution of the United States, declare the effect of judgments, they had not exercised the power.

¹ *Vance v. Vance*, 108 U. S. 514, 517.

² 4 Pa. 179.

³ *Bank of Alabama v. Dalton*, 9 Howard, 522; *McElmoyle v. Cohen*, 13 Peters, 212; 2 American Leading Cases (5th ed.), pp. 603, 662.

⁴ 9 Howard, 522.

The right of the legislature to limit the time within which suit may be brought, results from their right to modify or control the rules of evidence; and both powers may be exercised retroactively in the same statute. In *Korn v. Brown*,¹ an act providing that whenever no payment or demand shall have been made for or on account of a ground-rent, annuity, or other charge on real estate for the space of twenty years, such charge shall be presumed to have been released or extinguished, was held valid, though operating retrospectively, because it was not to take effect until three years after its passage, and simply laid down a rule of evidence which could prejudice no one save through his own negligence. The lapse of twenty years raised a presumption at common law as against a bond, and the legislature might establish a like rule with regard to other obligations.

Whether the bar of the statute of limitations can be removed after it has attached, is a different question, which should seemingly be answered in the negative, because the legislature cannot be supposed to have intended that the right should survive the extinction of the remedy.² A statute authorizing a recovery under such circumstances is therefore unconstitutional, at all events as regards the title to land or chattels; but the reason must be sought in the amendment which protects vested rights from deprivation without due process of law, and not in the prohibition of laws impairing the obligation of contracts.³

¹ 64 Pa. 55.

² *Moore v. The State*, 43 N. J. Law, 205; *Moore v. Luce*, 29 Pa. 262; *Baggs's App.*, 43 Pa. 512; *Leffingwell v. Warren*, 2 Black, 559; *Ball v. Wyeth*, 99 Mass. 338; *Atkinson v. Dunlap*, 50 Me. 111.

³ See *Moore v. The State*, 43 N. J. Law, 205; *Maxwell v. Goetschius*, 11 Vroom, 383; *Davidson v. New Orleans*, 96 U. S. 98.

LECTURE XXXII.

Judicial Legislation necessary and beneficial. — It may impair the Obligation of Contracts by laying down New Rules, but is not, where it does not involve the Interpretation of a Statute, a Law in the Sense of the Constitutional Prohibition. — In considering whether a Law impairs the Obligation of a Contract, the Supreme Court of the United States will determine for itself whether the Contract is void or valid. — The Statutes of a State are what they are declared to be by its Courts, and the Interpretation cannot be changed injuriously to Intervening Contracts. — A Law passed in the same Terms in two Different States, but differently interpreted by their Courts, is in effect two Different Laws, and will be so treated by the Supreme Court of the United States. — A Purchase on the faith of an Erroneous Judgment that the Title is good may confer a Valid Title. — A Constitutional Change or Amendment impairing the Obligation of Contracts is invalid.

WHAT is a law in the sense of the Constitutional prohibition? The question admits of an obvious reply where it arises under an enactment varying the pre-existing statutory or common law; but there are cases where it cannot readily be answered. A judgment construing or interpreting a grant or covenant, and determining that it does not confer the right claimed by the grantee or covenantee, does not ordinarily impair the obligation of the contract within the meaning of the Constitution of the United States, however widely it may vary from the opinion generally prevailing among jurists, or that previously expressed by the courts.¹ The appropriate function of the tribunals is *jus dicere*, to declare the rule, and not to make it; and the law will be presumed to have been as the court held, although the contrary is apparent. Contracts imposing personal obligations or conferring rights of property are, unless some federal

¹ *Bank v. Burlingame*, 5 Howard, 342; *Knox v. Exchange Bank*, 12 Wallace, 379; *University v. The People*, 99 U. S. 309.

question is involved, under the jurisdiction of the States both as regards the duties which they prescribe, and the rules by which they are governed. The judgment of a State tribunal, that a contract is contrary to public policy or good morals, or that there is a want or failure of consideration, may be erroneous, but it is none the less the law by which the parties must abide, and which must be applied in all similar cases. In such instances the national tribunals should follow the local law, and be guided by the judges to whom the task of interpretation has been intrusted by the people of the State in a matter where their will is supreme.¹ But it is not less clear that the safeguard which the Constitution provides for contracts is obligatory on all the branches of the State governments, and should not be set aside or evaded by the judiciary, or under color of a judgment which, though in form declaratory, virtually impairs contractual rights, by introducing novel rules or abrogating existing remedies. When, therefore, the question, whether the obligation of a contract has been impaired by subsequent legislation, is brought before the Supreme Court of the United States by a writ of error to a State tribunal, the entire case lies open for review, and it is necessary to consider not only the operation of the statute on the contract, but whether a contract was entered into and imposed the obligation which is alleged to have been impaired.² Such was the course pursued in the much-debated controversy as to the effect of the statutory exemptions from taxation which were set aside by the State tribunals as invalid, and upheld as contracts by the court of last resort.³ So where the Constitution of

¹ *The Lehigh Water Co. v. Easton*, 121 U. S. 388, 392; *Chicago Life Insurance Co. v. Needles*, 113 Id. 574, 582. See *ante*, p. 535.

² *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683, 697; *Louisville R. R. v. Palmes*, 109 Id. 254, 257.

³ See *The Bank of Toledo v. The City of Toledo*, 1 Ohio, n. s. 622; *Thorpe v. The Rutland R. R. Co.*, 27 Vt. 140; *Mott v. The Pennsylvania R. R. Co.*, 30 Pa. 9; *The Erie R. R. Co. v. The Commonwealth*, 66 Id. 84; 15 Wallace, 282; *Knoup v. The Piqua Bank*, 1 Ohio St. 603; *The Jefferson Bank v. Skelly*, 1 Black, 436; *The University v. People*, 99 U. S. 309; *Keith v. Clark*, 97 Id. 474.

Louisiana, as reconstructed after the Rebellion, declared that contracts made during the civil war, and payable in the notes of the Confederacy, were invalid, and should not be enforced, and judgment was rendered for the debtor in the State court on the ground that such contracts were against public policy and void *ab initio*, the Supreme Court reversed the decision notwithstanding the objection that what contracts are obligatory and what void, depends on the local law, and does not present a case under the Constitution or laws of the United States.¹

It results from this decision that while the validity of a contract made and to be performed within a State primarily depends upon the local law, and does not involve a federal question, the case is essentially different where the legislature intervenes to narrow or take away the remedy by which alone it can be enforced. Two points may arise, — Does the statute tend to impair the obligation? Was the contract binding under the pre-existing law? In determining the latter, the Supreme Court of the United States will be guided by its own judgment, and not by the decision of the court below. Such was the decision in *The Jefferson Bank v. Skelly*,² where Wayne, J., said: "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State whenever such a case shall be brought before it. It shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant to be one within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide, independently of the adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy is expressive of a contract and within the protection of

¹ *Delmas v. Insurance Co.*, 14 Wallace, 661.

² 1 Black, 443.

Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion; and in forming its judgment in such a case it makes no difference in the obligation of this court in reversing the judgment of the Supreme Court of a State upon such a contract whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State by its authority."

In these instances the main question was as to the operation of a retroactive statute, and the validity of the contract was considered incidentally; but it is not less clear that the judiciary cannot impair the obligation of a contract by putting a manifestly erroneous interpretation on the statutes under which the contract was executed, and which constitute its obligation. If, for instance, the highest tribunal of a State decides, contrary to the plain intent of a prior statute, that a mandamus cannot be issued to compel a municipal corporation to levy and collect the taxes requisite for the payment of its debts, the rights of the creditors are as much violated as if the statute were repealed, and the federal tribunals may afford redress.¹ There is not, in the ordinary sense of the term, a law impairing the obligation of the contract, but there is an erroneous interpretation of the law, which has practically the same effect.

It was accordingly decided in *Butz v. Muscatine* that whether the remedy is taken away by a statute or by a judgment denying what the statute manifestly provides, the result is equally at variance with the Constitution of the United States, and the error should be corrected by ordering the mandamus to go forth. The Chief-Justice and Mr. Justice Field dissented, on the ground that where there has been

¹ *Butz v. The City of Muscatine*, 8 Wallace, 583.

no prior decision, and the statute comes before the State courts for the first time, their interpretation must be regarded as correct, and should be followed by the federal tribunals.

Agreeably to this decision, a judicial misinterpretation of a statute which impairs the obligation of a contract made in the interval between the passage of the bill and the delivery of the judgment, is a law in the sense of the constitutional prohibition. The principle would seem to be logically as applicable to an erroneous construction of the common law, by holding that there is no consideration contrary to the fact, or that a valid contract is illegal or against public policy; but agreeably to the settled course of federal decision, does not go so far.¹

In *Butz v. Muscatine* the case depended on whether the judgment of the court below was sound; but there is another phase of the question, in which it may be the duty of the Supreme Court to reverse a sound judgment, in view of another which was pronounced under a mistaken interpretation of the law or contract. For if the law is defined, although erroneously, by a court of last resort, the subsequent enunciation of a different rule will have the same injurious effect on rights acquired during the interval as if the change were legislative instead of judicial. It follows that a State court cannot impair the obligation of a contract which has been executed on the faith of the interpretation which it has put on a local enactment by enunciating a new or inconsistent rule. It is immaterial, as regards the application of this principle, that the former decision was unsound, and could not stand the test of legal criticism, because it was the only source to which the citizen could look for guidance.² The question in *Louisiana v. Pilsbury* was, could the Supreme Court of Louisiana, by changing the view which it had taken of a statute, invalidate negotiable bonds which would have been obligatory had the former judgment been allowed to stand, and was decided negatively on the follow-

¹ *Lehigh Water Co. v. Easton*, 121 U. S. 388, 394.

² See *Gilpecke v. Dubuque*, 1 Wallace, 175; *Olcott v. The Supervisors*, 16 Id. 678; *Louisiana v. Pilsbury*, 105 U. S. 278, 291.

ing grounds: "Whether the construction originally placed upon the clause of the Constitution of 1845 was or was not erroneous, will not be considered in determining the validity of the bonds. The exposition given by the highest tribunal of the State must be taken as correct, so far as contracts made under the act are concerned. Their validity and obligation cannot be impaired by any subsequent decision altering the construction. This doctrine applies as well to the construction of a provision of the organic law as to the construction of a statute. The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State, and enforced in accordance with it in all cases arising under it.¹ The statute, as thus expounded, determines the validity of all contracts under it. A subsequent change in its interpretation can affect only subsequent contracts. The doctrine on this subject is aptly and forcibly stated by the Chief-Justice in the recent case of *Douglass v. County of Pike*:² 'The true rule is to give a change of judicial construction, in respect to a statute, the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself; and a change of decision is to all intents and purposes the same in its effect on contracts as an amendment of the law by means of a legislative enactment.'"³

¹ *Christy v. Pridgeon*, 4 Wallace, 196, and *Shelby v. Guy*, 11 Wheaton, 361.

² 101 U. S. 677, 687.

³ It is said in *The Lehigh Water Co. v. Easton*, 121 U. S. 388, that a prohibition of laws impairing the obligation of contracts necessarily

The rule applies, not only as between the original parties, but in favor of third persons who buy on the faith of a decision that a bond payable to bearer or other negotiable instrument has been duly issued and will confer a valid title and may render the instrument obligatory in their favor, although it would have been void in the hands of the first taker.¹ In *Thompson v. Perrine*,² municipal bonds which had been illegally issued were ratified by an act of the State legislature, approved April 28, 1871, and subsequently purchased by the plaintiff, while the courts of New York held that such defects might be cured by retrospective legislation; and it was decided that the Court of Appeals could not, by changing its ground and declaring the confirmatory act unconstitutional, defeat a title which had been acquired in reliance on the previous decisions of the same tribunal.³

The authorities are summed up in the following extract

refers to laws made after the contract in suit; but in applying this rule it must be remembered that the judicial interpretation of a statute is a law relatively to past as well as future contracts, whether they were made before or subsequently to the statute.

¹ See *ante*, p. 586.

² 103 U. S. 9, 10; 93 Id. 806.

³ "The defendant in error acquired the bonds in suit in 1875, before the decision in *Horton v. The Town of Thompson*, and when, according to the principles announced in *The Town of Duanesburgh v. Jenkins* and many prior cases in the Court of Appeals, the act of 1871 must have been sustained as an exercise of legislative power. He purchased them for value at public auction in the city of New York, without notice of any defence thereto, or of the pendency of any suit involving their validity. If the recitals in the bonds gave notice that the acts of 1868 and 1869 forbade their exchange for stock, and required them to be sold, and their proceeds invested in such stock, the purchaser is also presumed to have known, not only that such exchange had been legalized by the act of 1871, but that the authority of the legislature to pass that act was sustained by decisions of the highest court of the State rendered prior to its passage. This right should not, therefore, be affected by a decision rendered after it accrued, which decision is in conflict with the law as declared not only by this court in numerous instances, but by the highest court of the State at and before the time he purchased the bonds."

from the judgment in *Taylor v. Ypsilanti*:¹ “‘The sound and true rule,’ said Taney, C.-J., in *Ohio Life Insurance Co. v. Debolt*,² ‘is that if the contract when made is valid by the laws of the State, as then expounded by all the departments of its courts of justice, its validity and obligation cannot be impaired by any subsequent act of the legislature of the State or decision of its courts altering the construction of the law.’ So in *The City v. Lamson*,³ Mr. Justice Nelson, speaking for the court, said: ‘It is urged also that the Supreme Court of Wisconsin has held that the act of the legislature conferring authority upon the city to lend its credit and issue the bonds in question was in violation of the provisions of the Constitution above referred to. But at the time this loan was made and these bonds were issued, the decisions of the courts of the State favored the validity of the law. The last decision cannot, therefore, be followed.’ Again, in *Olcott v. The Supervisors*,⁴ the court, speaking through Mr. Justice Strong, said: ‘This court has always ruled that if a contract when made was valid under the Constitution and laws of a State as they had been previously expounded by its judicial tribunals and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing its invalidity.’ To the like effect are some very recent decisions of this court, — *Douglass v. County of Pike*,⁵ *Thompson v. Perrin*.”⁶

The term “laws” used in this opinion is broad enough to include every rule of property or conduct which is obligatory and may be judicially enforced, whether it is laid down by the legislature, enunciated by the courts, or handed down traditionally from the past; but we may infer from the context, and the language held in *Delmas v. The Insurance Co.*,⁷ that it was employed in the narrower sense in which law is synonymous with statute, and that a judgment or decree of a

¹ 105 U. S. 7.

² 16 Howard, 416, 432.

³ 9 Wallace, 477, 485.

⁴ 16 Wallace, 678.

⁵ 101 U. S. 677.

⁶ 103 U. S. 806.

⁷ 14 Wallace, 661.

State tribunal declaring a contract void on general principles of policy or morals cannot, when such are the only grounds, be reviewed by the Supreme Court of the United States, even for the sake of vindicating the obligation against what is in effect judicial legislation. The law is now settled on this basis,¹ but the principle would seem to be logically applicable wherever a contract which is valid agreeably to the doctrine of a prior judgment is set aside by a decision which introduces a new and different rule; and there are cases which approach, if they do not fully cover, this ground.² The rule as laid down in *Olcott v. The Supervisors*³ is that if a contract when made is binding under the Constitution and laws of a State as they have been expounded by its tribunals and as they were understood at the time, no subsequent action by the legislature or the judiciary can render it invalid; and any law or judgment which produces such an effect will be disregarded by the Supreme Court of the United States. It follows that where the construction of a railroad by a company incorporated for that end has been judicially treated as a public use which warrants the taking of land, the courts cannot, by shifting their ground and denying it that character, invalidate municipal bonds that have been issued with a view of aiding the company in the prosecution of the work.

Some of the above judgments go so far that they should consistently be carried farther. If when the legislature have explicitly declared their will, we are to look for the rule in the interpretation given by the courts, however widely it may vary from the language of the statute, and though it leads to contradictory results, such, for a stronger reason, should be the effect of a judicial exposition of the customary or unwritten law, which varies in different countries, and even in provinces ruled by the same sovereign. Yet, agreeably to the view taken by the Supreme Court of the United States, the rules laid down by the State tribunals with regard

¹ *The Lehigh Water Co. v. Easton*, 121 U. S. 388, 392. See *ante*, p. 719.

² See *Menges v. Dentler*, 33 Pa. 495.

³ 18 Wallace, 678.

to bills, notes, policies of insurance, and other written instruments, with the general acquiescence that gives custom to the force of law, may be disregarded by the federal courts, although the question is one where there is room for a difference of opinion, and precedent is the only certain guide; and the effect is to impair the obligation of contracts which have been made in the belief that the course of decision would not be changed.¹ The State courts are thus placed in an embarrassing dilemma, and may have to choose between the conflict of jurisdiction incident to discordant rules administered by co-ordinate tribunals, and impairing the obligation of contracts that have been made on the faith of their own decisions in deference to the opinion of the national court of last resort in matters where it is not authorized to give the law. Were Congress to exercise such a control, the statute would be set aside as unconstitutional, in trenching on the purely internal commerce which is reserved to the States.² And the principle is the same where the effect is produced through a judgment of the Supreme Court instead of an act of Congress.

The first indication of a principle which has since borne unexpected fruits may be found in *Menges v. Dentler*,³ which decided that when the title to a tract of land has been erroneously adjudged to be good, and value is given on the faith of the decree, the court cannot retrace its steps to the injury of the purchaser whom it has misled. The question arose under the following circumstances. Land owned by *Menges* was sold by the sheriff under an execution against him, and conveyed to the purchaser; and it was held that the proceeding was irregular and did not pass the title, because the premises were situated in another bailiwick and beyond the jurisdiction of the court. An act of assembly was then

¹ See *Oates v. The National Bank*, 100 U. S. 245; *The Railroad Co. v. The National Bank*, 102 Id. 14; *Swift v. Tyson*, 16 Peters. 1; *Carpenter v. The Providence Insurance Co.*, Id. 495; *Brooke v. The Railroad Co.*, 103 Pa. 537. See *ante*, pp. 443-445, 495.

² See *ante*, p. 444.

³ 33 Pa. 495.

passed to cure the defect, and sustained by the Supreme Court of Pennsylvania on the ground that as the proceeds of the execution had gone to pay Menges's debts, he was under a moral obligation to ratify the sale; and the legislature might well add a legal sanction.¹ Dentler subsequently bought the land on the faith of this decree, and the question was again argued before the same tribunal; which was of opinion that the former decision was erroneous, and the statute invalid, but that the error could not justly be corrected as against a purchaser who had given value in reliance on an adjudication by the department of the government which is charged with the administration of justice, and might equitably retain what he had honestly acquired.

The ejectment was brought in this case for the very premises which had been in controversy in *Menges v. Wertman*;² but a purchaser whose title depended on the power of the legislature to give legal efficacy to a naked moral obligation to convey, would have been equally entitled to protection, though the land was not the same. For as the rules laid down by the tribunals of last resort are, from the necessity of the case, law until they are abrogated by the legislature or overruled judicially, so they enter into and form part of the obligation of contracts made while they are still in force. The case turned on the interpretation and validity of a statute; but the principle would have been the same had the prior decision rested solely on the duty growing out of the application of the proceeds of the sale to the payment of the debts of the party who sought to set it aside.

There can be little doubt that judgments are, as this decision implies, so far legislative that they cannot justly be overruled without a reservation of rights which have been acquired in the belief that they will stand. Whatever care may be taken to keep the functions of government separate, it is neither wise nor practicable to prevent the judiciary from legislating.³ The development of English like that of Roman

¹ See *Menges v. Wertman*, 1 Pa. 218.

² 1 Pa. 218.

³ See *M'Clure v. Foreman*, 4 W. & S. 279, 280.

law is due to the jurists by whom it has been practised or administered, rather than to the positive enactments which are generally known as laws. It was well said by De Lolme that the Court of Chancery operated as an experimental legislature in laying down rules and maxims which were subsequently tested by experience, and not infrequently adopted by Parliament or the courts of law; and no inconsiderable part of the common law has, as in the noted instance of *Taltarum's case*,¹ been introduced or formulated from the Bench. In like manner, much of what is novel and distinctive in American jurisprudence is judge-made law; and if the effect has sometimes been to impair the obligation of contracts by imposing rules which were unknown until they were promulgated, the benefit outweighs the inconvenience. Such is the extent of the judicial power in this regard that it may modify or virtually supersede the legislative. The interpretation given to a statute by the courts is as much a part of the enactment as the text itself; and if two statutes couched in the same terms in two separate States are construed differently by the courts of last resort, they will be different laws, and so treated by the Supreme Court of the United States.²

In *Irwin's Appeal*,³ the Supreme Court of Pennsylvania decided that a covenant to pay a rent reserved in fee does not bind the executors of the covenantor, and thus not merely withheld the redress to which the plaintiff was entitled under the generally received interpretation of the pre-existing law, but laid down retroactively a rule which took away the remedy against the covenantor's estate in other cases of the same kind. So the rule that no one shall recover for an injury resulting from the negligence of the engineer of a locomotive at a railroad-crossing unless he stopped, looked, and listened before venturing on the track, was judicially established in the *North Pennsylvania R. R. Co. v. Heilman*, and defeated

¹ 12 Edw. IV. 19.

² *Christy v. Pridgeon*, 4 Wallace, 196; *Louisiana v. Pilsbury*, 105 U. S. 278, 294. See *ante*, p. 723.

³ 22 Pa. 510.

existing claims that were generally regarded as valid.¹ In like manner, a guaranty may be judicially impaired by holding, under a mistaken view of the mercantile law, that the creditor must push the principal debtor to insolvency, or make a demand on him and give notice of his default before suing the guarantor.² Whether a novel rule precluding a recovery on an antecedent contract, unless some act is done which is not required by its terms, be imposed by the legislature or laid down retroactively by a court, there is, as the language of Taney, C.-J., in the *Ohio Life Insurance Co. v. Debolt*³ implies, an equal disregard of the constitutional prohibition.⁴

The principle of *Menges v. Dentler* has nevertheless been disregarded in cases where it should seemingly have been applied. Agreeably to *Lancaster v. Dolan*,⁵ which was decided as far back as 1829, a *feme covert* was powerless in Pennsylvania to convey property which had been settled to her separate use, and could neither sell nor mortgage unless expressly authorized by the deed or will through which she acquired her title. The judgment was contrary to the rule in England and New York, and a surprise to no inconsiderable part of the profession. It was subsequently held, in *Cummings's Appeal*,⁶ that the act of 1848 had worked a radical change in the condition of a *feme covert*, and that she might dispose of her separate estate as if she were *sole*; and in *Haines v. Ellis*⁷ the court held, agreeably to this opinion, that a conveyance of the separate property of a married woman conferred a title which was not only valid, but free from every reasonable doubt. This judgment was rendered in 1853; but when a mortgage executed in 1858 came before the same court in 1860, that tribunal virtually overruled

¹ See the *Hanover R. R. Co. v. Coyle*, 55 Pa. 396; *The Pennsylvania R. R. Co. v. Beale*, 73 Id. 504.

² See *Douglass v. Reynolds*, 7 Peters, 113; 12 Id. 497; *Douglas v. Howland*, 24 Wend. 35; *Powers v. Bumcratz*, 12 Ohio St. 275, 290; 2 *American Leading Cases* (5th ed.), 104, 115, 118.

³ 16 Howard, 416, 431.

⁴ See *Keith v. Clark*, 97 U. S. 454.

⁵ 1 Rawle, 231.

⁶ 1 Jones, 275.

⁷ 24 Pa. 253.

Haines v. Ellis without citing it, and declared that the act of 1848 had no bearing on the controversy, which was governed by the doctrine of *Lancaster v. Dolan*.¹ The question arose not long afterwards in *Wright v. Brown*,² and was determined in the same way, without adverting to *Menges v. Dentler*, on which the court below had relied in giving judgment. Such a result is the less explicable because no case could well be fairer for the application of the rule that purchasers who are misled by a judicial decision shall not suffer from an error for which they are not responsible. Although the parties and the estate were different, the case was identical in principle with *Haines v. Ellis*, and within the rule which was there laid down as embracing every such transaction. All the elements of a contract were present, — assent, a consideration, and the forms prescribed by law; and the highest authority in the State had declared such contracts valid. Yet the mortgagee was not allowed the benefit of the doctrine that the judiciary no more than the legislature can change the law retroactively to the injury of purchasers, and lost a security which a conveyancer would have pronounced undeniable. The mortgage in this instance was for an antecedent debt; but the remark does not apply to *Shonk v. Brown*,³ which was decided with a like disregard of the rule that obligations depend on the law under which they are incurred, and if they stand that test, cannot be impaired retroactively. These decisions would presumably have been reversed had a writ of error been taken to the Supreme Court of the United States. A mortgage is not less a contract, within the doctrine of *Fletcher v. Peck*, than a bond, and the decision that the act of 1848 authorized married women to deal with their separate property as if they were *sole*, was as much a part of the statute, agreeably to *Louisiana v. Pilsbury*,⁴ as if it had been incorporated with it by the legislature, and could not be overruled to the prejudice of grants or contracts made during the interval.

¹ *The Pennsylvania Co. v. Foster*, 35 Pa. 134.

² 44 Pa. 224.

³ 61 Pa. 320.

⁴ 105 U. S. 278.

The organic laws of the various States are self-imposed restraints which may be laid aside at pleasure, and do not preclude the citizens of a State from acting in their sovereign capacity as they think proper. The Constitution of a State may consequently be abrogated, and with it the safeguards which it affords to liberty, property, and contracts. On the other hand, the Constitution of the United States is binding on a State as an organic whole, and will no more permit the obligation of a contract to be impaired by an amendment of the State Constitution than by a statute. The object was to protect contracts against retroactive legislation; and the term "law" is broad enough to include every rule of property or conduct enacted by the sovereign power of a State or by virtue of an authority which it has conferred; and hence, whether an antecedent obligation is impaired by the people, the legislature, the judiciary, or the executive, the federal tribunals may afford redress.¹

In *Dodge v. Woolsey*,² the Commercial Bank of Cleveland was incorporated by the legislature of Ohio in 1845 with a stipulation that it should not be taxed beyond a certain limit. A new constitution, adopted in 1851, provided that the capital employed in banking should bear a burden of taxation equal to that imposed on individuals; and it was contended that the people of a State had an indefeasible right to change the framework of their government, and might revoke the powers which they had conferred on the legislature, and with them every derivative right or title. In accepting the charter the bank knew that the Constitution of Ohio might be amended, and that if it were, all rights derived through it would fall. This argument was overruled by the Supreme Court of the United States as contrary to the true intent of the Federal Constitution, and tending to a conclusion which would enable the people of a State to impair the obligation

¹ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 672; *Skelly v. The Sandusky Bank*, 1 Black, 436; *Delmas v. The Insurance Co.*, 14 Wallace, 661; *Woodruff v. Trapnell*, 10 Howard, 190; *Keith v. Clark*, 97 U. S. 454; *The People v. The Soldiers' Home*, 95 Ill. 561.

² 18 Howard, 331.

of contracts by substituting a plebiscitum or the decree of a convention for the ordinary forms of legislation.

A like decision was made in the *Northwestern University v. The People of Illinois*.¹ The Constitution of that State, as amended in 1870, declared that only such property should be exempt from taxation as was used exclusively for school, charitable, or religious purposes; and it was held that this provision, and a statute passed to carry it into effect, were unavailing as against a stipulation in an antecedent charter that all the property of the Northwestern University should be forever free and exempt.

It is immaterial, as regards the application of the principle, that the constitutional amendment is based on the assumption that the contract has inherent defects and should be vacated as contrary to public policy or good morals, and that the Supreme Court of the State took the same view in delivering judgment, because it will still be for the Supreme Court of the United States to consider whether the alleged defect is real, and not suffer the contract to be retroactively impaired on grounds which have no foundation. It was accordingly held in *Delmas v. The Insurance Co.*² that as contracts payable in the notes of the Confederate States, or into which such notes entered as the consideration, were not necessarily illegal, and a State could not set them aside by amending its Constitution, so a judgment of the Supreme Court of the State based on such grounds must be reversed.

¹ 86 Ill. 141; 99 U. S. 309.

² 14 Wallace, 661.

LECTURE XXXIII.

The Obligation of a Grant may be impaired by taking the Land from the Grantee and transferring it to a Third Person. — Retroactive Legislation is not necessarily invalid, even when the Effect is to defeat Pre-existing Rights. — Confirming an Invalid Deed or Contract does not contravene the Constitutional Prohibition, although the Grantor is thereby obliged to surrender what he might otherwise legally have retained. — Distinction between Defences given for the Public Good and for the Protection of Individuals. — A Defective Acknowledgment may be rendered valid retroactively. — Contracts voidable for Fraud or Breach of Condition may not, and Contracts which are defective in Form or Consideration may, be confirmed legislatively.

CAN property be taken from the owner and bestowed on a third person, or appropriated without compensation to a public use, consistently with the prohibition of *ex post facto* laws and laws impairing the obligation of contracts? This question has frequently been mooted in the courts, and not always answered in the same way. A law divesting the title of a grantee and reinstating the grantor, obviously impairs the obligation by enabling the latter to resume what he has agreed to part with. Accordingly, the legislature cannot take back the property or franchises which it has conferred on a body corporate or an individual, even when the grant is statutory, and might be repealed if it were not a contract, or although the allegation is that the act was procured by bribery or fraud. If such a question is to be raised, it must be in the courts of law, and through an ejectment, *quo warranto*, or other writ framed for such a purpose.¹ So the Constitution is clearly violated by a law exonerating the vendor of a chattel from the obligation to deliver the thing sold, or declaring the bill of sale which he has executed null and void. But while it has uniformly been conceded that

¹ Fletcher v. Peck, 6 Cranch, 86.

a State may not annul the title of a purchaser or those claiming under him, and revest it in the grantor, it was intimated in some of the earlier decisions that there is nothing in the Constitution of the United States, as originally framed, to preclude a State from stripping one man of his right or title for the purpose of conferring it on another who is a stranger to the grant or contract out of which it arose.¹ In other words, it is not the taking of the property from the grantee, but the restoration of it to the grantor, contrary to the terms of his agreement, which violates the obligation and brings the case within the constitutional prohibition.

This would seem to be a narrow construction, calculated to defeat the object which the framers of the Constitution had in view. The title to real estate may ordinarily in the United States, and always in Pennsylvania, be traced back to an express or implied grant from the State; and when such is the case, the State obviously cannot resume what it gave without a breach of faith, whether the property is appropriated to its own use or bestowed on a third person. The argument is less convincing when the right is not derived, mediately or directly, from a public source, or as applied to chattels; but it may still be said that when property which A has sold to B is restored to A, it is the spoliation of B's right, and not the benefit conferred on A, which impairs the grant, and that it would be equally impaired if the legislature were to dispossess B without returning the goods or land to A, or appropriate them without compensation to a public use.

Whether such an exercise of despotic will does or does not impair the obligation of the grant considered as a contract, it should be treated as *ex post facto* and invalid, although the object be not punishment, but spoliation or the attainment of some personal or political end.² This view is

¹ See *Harvey v. Thomas*, 10 Watts, 63, 66; *Sharpless v. The Mayor of Philadelphia*, 21 Pa. 147, 165, 167; *Grim v. The Weissenberg School District*, 57 Id. 433, 436.

² See *ante*, p. 548; *Grim v. The Weissenberg School District*, 57 Pa. 433, 436; *Palairret's Appeal*, 67 Id. 479.

to a great extent sustained by the case of *Fletcher v. Peck*.¹ The question there considered was the validity of an act of the legislature of the State of Georgia, declaring a statutory grant by a prior legislature null and void, as having been procured by corrupt means, and declaring that the patents which had been issued in pursuance thereof were equally invalid. It appeared on the face of the pleadings and from the special verdict that the plaintiff was a purchaser from the original grantee for value, and without notice of the alleged fraud. In delivering judgment, Marshall, C.-J., took the following ground: "It was doubtful whether a statutory grant could be impeached under any circumstances on the ground of fraud. Such an inquiry would involve considerations which could hardly be defined in principle or applied in fact. Must the corruption be direct? or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number, of the members? Should an act which accorded with the will of the people, and might have been sustained by the unbiassed judgment of the House, be set aside because other and improper motives had co-operated? However this might be, it was very clear that the State ought not in any such case to act as a judge in her own cause. The inquiry should be prosecuted judicially before some impartial tribunal. If this course had been pursued in the case under consideration, it would have appeared that the title of a *bona fide* purchaser was involved, and could not be impeached for a fraud in the original grant. The plaintiff had bought without notice of the corrupt means which were alleged to have been used in procuring the passage of the statute, and equity would not subject him to the penalties attached to an offence of which he was ignorant. The rescission of the former statute could not therefore be vindicated as a judicial act; and it might be doubted whether there was any ground on which it could be sustained. The general principle that one legislature might repeal a law which another had passed, was undeniable; but it was equally

¹ 6 Cranch, 86.

true that if an act was done under a law, a succeeding legislature could not undo it. The past could not be recalled by the most absolute power. To sustain the statute by which the title of the plaintiff was alleged to be invalidated, it must therefore be contended that the legislature might divest vested rights in every instance, and take property fairly and honestly acquired without compensation. This perhaps might be a doubtful question if Georgia were a single sovereign power, subject to no other restrictions than those imposed in her own Constitution. But this was not the case. She was a part of a large empire, a member of the American Union, and subject to the restraints which the Constitution of that Union had imposed. By that Constitution it was provided that no State should pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts. A bill of attainder might affect the life of an individual, or might confiscate his property, or it might do both. In this form the power of the legislature over the lives and fortunes of individuals was especially restrained. An *ex post facto* law was one rendering an act punishable in a manner in which it was not punishable when committed. Such a law might inflict penalties on the person, or might inflict pecuniary penalties to swell the public treasury. The legislature was then prohibited from passing a law by which a man's estate, or any part of it, should be seized for a crime which did not by some previous law render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing for public use the estate of an individual in the form of a law annulling the title by which he held that estate? No sufficient ground could be perceived for such a distinction. The rescinding act would have the effect of an *ex post facto* law. It forfeited the estate of the plaintiff for a crime not committed by himself, but by those from whom he purchased. This could not be done in the form of an *ex post facto* law or bill of attainder. Why, then, was it allowable in the form of a law annulling the original grant?"

It would seem obvious from this argument, which, like

all the reasoning of Chief-Justice Marshall on constitutional questions, is conspicuous for its breadth of thought and logical precision, that he viewed the clause prohibiting bills of attainder, *ex-post facto* laws, and laws impairing the obligation of contracts, as forming a whole intended to protect the citizen from retroactive legislation to the prejudice of vested rights in any form ; and although dicta may be found tending to narrow this construction, there is no case in which the contrary has been adjudged.¹ It is nevertheless established, under the authorities and on principle, that retroactive legislation is not necessarily invalid under the National Constitution or the organic laws of the several States, even when the effect is to defeat pre-existing rights, or enable a plaintiff to recover property which might otherwise have been legally withheld.² The question is not an abstract one, but depends largely on the circumstances under and the end for which the power is exercised ; and a reference to the books will show that there is a field within which such statutes may operate beneficially to the community and without prejudice to individuals. Laws prescribing periods of limitation, or regulating the order and admissibility of evidence, are retroactive, unless existing demands are exempted from their operation ; and this is equally true of laws confirming transactions which, though good in substance, have failed in point of form. But inasmuch as such legislation does not impose a penalty, and tends to sustain what has been done or agreed on, or to compel suit to be brought within a reasonable period and while the transaction is still fresh in the minds of the parties, it is not *ex post facto*, nor does it impair the obligation of contracts.

A statute confirming an invalid deed or contract, or even creating a contract where none exists, may be unconstitutional on other grounds, but does not impair the obligation

¹ See *ante*, p. 548.

² *Weed v. Donovan*, 114 Mass. 187; *Calder v. Bull*, 3 Dallas, 386; *Lycoming v. Union*, 15 Pa. 170; *Bleakney v. The Bank*, 17 S. & R. 61; *Weister v. Hade*, 52 Pa. 474; *Grim v. The Weissenberg School District*, 57 Id. 433.

which the framers of the Constitution intended to protect. The point is too plain for argument, and has been repeatedly decided by the State tribunals and the Supreme Court of the United States.¹

When the case of *Satterlee v. Matthewson* was first heard by the Supreme Court of Pennsylvania, a lease from a claimant under a Connecticut grant was held to be void under a statute which imposed a penalty on every one who should enter on, hold, or convey land by virtue of such a title; and it was said to follow that the lessee might purchase an outstanding title and set it up against the lessor. The judgment rendered against the tenant in the court below was accordingly reversed, and a *venire de novo* awarded. Before the case came to a second trial in the county court, the legislature declared that "the relation of landlord and tenant shall exist and be held as fully and effectually as between other citizens of the commonwealth in any cause now pending or hereafter to be brought between Connecticut settlers and Pennsylvania claimants," and the jury were instructed that the objection on which the court above relied was obviated, and that their verdict should be for the landlord. A writ of error was again brought to the Supreme Court, who were of opinion, with the court below, that as the law which invalidated the lease was made for a public end, — to prevent intrusion on the territory of Pennsylvania under grants from another State, — she might well do away with the disability which it imposed, and allow the contract to operate as the parties intended.

The case was then taken to the Supreme Court of the United States, which sustained the judgment. The repeal of so much of the antecedent statutes as invalidated the lease did not impair the obligation, because the effect was the direct opposite, — to confirm the contract which the previous legislation of the State had impaired. Should the

¹ *Welch v. Wadsworth*, 30 Conn. 149; *Wood v. Kennedy*, 19 Ind. 68; *Satterlee v. Matthewson*, 13 S. & R. 133; 16 Id. 169; 2 Peters, 380; *Read v. Plattsouth*, 107 U. S. 568; *Ewell v. Daggs*, 108 Id. 143, 150; *Gross v. The U. S. Mortgage Co.*, Id. 477, 488.

legislature go so far as to declare an antecedent contract valid, notwithstanding the immoral or illegal nature of the consideration, the statute would contravene the general principles of jurisprudence and impose an obligation where none existed; but it would still be obvious that to create and to impair were not the same, and that the constitutional prohibition was not infringed. It had been contended that the statute was a usurpation of the judicial function. This allegation did not appear to be well founded; but, if just, there was still no infringement of the Constitution of the United States, which does not assume to regulate the distribution of power among the various branches of the State governments. As to the remaining objection, that the act divested vested rights, if such was its operation it was still not contrary to the Constitution, which only prohibited retroactive legislation when *ex post facto* or impairing the obligation of contracts.

In *Wilkinson v. Leland*,¹ a law confirming a sale made by an executrix in Rhode Island, under a license granted by a court of probate sitting in New Hampshire, was in like manner sustained by the Supreme Court of the United States. Story, J., said, in giving judgment, that even in the absence of the express restraints which did not exist in Rhode Island, no legislative assembly in this country could arbitrarily dispose of the property of the citizen without his consent. There was no instance where a statute, assuming to transfer the property of A to B, had been held constitutional. On the contrary, such attempts had uniformly been resisted, as contrary to the fundamental principles of a free government. The law under consideration was not obnoxious to this criticism. The sale which it purported to confirm was made for the payment of the testator's debts, and the proceeds had been duly distributed among his creditors. The transaction was therefore good in substance, and only erred in point of form. If application had been made to the courts of Rhode Island, they would have granted the requisite authority to the executrix; and

¹ 2 Peters, 657. See *Nelson v. Lane*, 79 Pa. 407; *post*, p. 847.

what the judiciary would have authorized, the legislature might ratify.

In *Watson v. Mercer*,¹ the legislature of Pennsylvania had passed an act declaring that no deed theretofore executed by a husband and wife, and acknowledged by them before a justice of the peace or other duly authorized officer, should be deemed invalid by reason of any informality or omission in setting forth the particulars of the acknowledgment, but that such instrument should be as effectual for passing the estate as if every such particular were specifically set forth in the certificate. The effect of this statute was to confirm deeds which were invalid under the pre-existing law as interpreted by the judiciary; and it was contended that this was contrary to the Constitution of the United States and of the State of Pennsylvania, as operating to divest the grantors' right and confer it on the grantees. The Supreme Court of the State was, however, of opinion that the law did not operate on the right, but merely on the evidence by which the right was established. As the law stood before the passage of the statute, the magistrate's certificate was the only proof that could be received to show that the deed was acknowledged by the *feme covert* separately and apart from her husband, and with a full knowledge of the contents; but the legislature might allow the defects and errors of the writing to be supplemented by extrinsic evidence. If, however, the act operated on the title and not on the evidence, the effect was still not to impair the contract, but to confirm it. The judgment was affirmed by the Supreme Court of the United States on the ground that so far as the statute had any legal operation, it went to sustain the grant by giving the effect to the deed which the grantor intended. The same rule has been applied in other instances, and is beyond dispute.²

It is immaterial as regards the principle whether the contract is voidable, or so far contrary to the common or statutory

¹ 1 Watts, 330, 357; 8 Peters, 88.

² *Goshorn v. Purcell*, 11 Ohio St. 611; *Carpenter v. Pennsylvania*, 17 Howard, 456; *Journey v. Gibson*, 56 Pa. 57.

law as to be merely void. If it be said that the mischief is the same whether an obligation is imposed where none exists, or an existing obligation abrogated, the answer is that it does not fall within the constitutional prohibition, nor can the repeal of a disabling statute be viewed as penal because it precludes the grantor or obligor from making a technical excuse for not complying with his engagement.¹

In *Hess v. Wurtz*² the Supreme Court of Pennsylvania held that a bank-note issued contrary to an act of assembly which declared that every such instrument should be null and void, might be rendered valid by repealing the disability and authorizing the payees to proceed to judgment. Gibson, J., said that the object of the legislature in prohibiting manufacturing companies to issue bank-notes, and declaring such instruments void, was not to create a privilege or shield the makers from paying their just debts, but to prevent them from violating the law by destroying the credit of their paper and rendering it worthless to the takers. The loss fell on those who received the notes; but the company were the principal offenders, and it did not lie in their mouths to say that the State could not remit the penalty by enabling the holders to sue. Might not the legislature pardon the offence without consulting those who had committed it; or could one *particeps criminis* insist on having another punished because he was interested in having the penalty inflicted? Although the contract was so far void that it could not be enforced by suit, there was still a moral obligation to perform it whenever the prohibition was withdrawn; and it would be going very far to say that the legislature might not add a legal sanction.

It follows from this decision that wherever the right of the defendant to annul his contract has been conferred from motives of public policy, and not for his protection, it may

¹ *Ewell v. Daggs*, 108 U. S. 143, 151; *Gross v. The U. S. Mortgage Co.*, Id. 477, 488; *Lewis v. McElvain*, 16 Ohio, 347; *Trustees v. McCaughey*, 2 Ohio St. 155; *Savings Bank v. Fallon*, 28 Conn. 97; *Bleakney v. The Bank*, 17 S. & R. 64.

² 4 S. & R. 356.

be taken away retroactively by a statute.¹ The consideration received, and the promise actually made, though contrary to law, are, agreeably to this view, sufficient ground for the subsequent imposition of the liability which he intended at the time to incur. The law has been so held in numerous instances growing out of the repeal of the statutes against usury,² and was recently applied by the Supreme Court of the United States in a case arising since the adoption of the Fourteenth Amendment, which might have been thought to bring it within a different rule.³

In the cases above cited, the invalidity was statutory; but we may concur with the dicta in *Satterlee v. Matthewson*,⁴ that the power of confirmation may equally well be exercised, so far as the prohibition of laws impairing the obligation is concerned, where the contract is invalid at common law for want of some essential requisite, or because it contravenes the rules of morals. A retroactive statute giving the force and effect of a covenant to a naked parol promise, or providing that it shall be valid, notwithstanding the want of a consideration, obviously does not impair the obligation, although it may conflict with the rule that no one shall be deprived of his life, liberty, or property without due process of law. The better opinion would nevertheless seem to be that if the legislature may arbitrarily repeal a defence that has been given for the benefit of the State, it has such power over rules which have been laid down for the protection of the individual. The disabilities of minors and *femes covert* are in this category, which should seemingly include usury laws, as intended to guard needy and improvident debtors from sacrificing the future to present ease. It is equally clear that a law modifying or controlling the course of legal proceedings, or even

¹ *Gross v. The U. S. Mortgage Co.*, 108 U. S. 477, 489; *Read v. Platts-mouth*, 107 Id. 568.

² *Curtis v. Leavitt*, 15 N. Y. 9; *Welch v. Wadsworth*, 30 Conn. 149; *Parmelee v. Lawrence*, 48 Ill. 331; *Danville v. Pace*, 25 Grattan, 1.

³ *Ewell v. Daggs*, 108 U. S. 143, 151.

⁴ See *ante*, p. 739; 13 S. & R. 133.

setting aside a judgment or granting a new trial, although it may be void as a usurpation of judicial power, does not impair the obligation of contracts within the meaning of the Constitution of the United States, unless the suit is brought to enforce a contract, and the effect is to hinder or preclude the only effectual remedy.¹

In *Calder v. Bull*² the question was as to the validity of a law passed by the legislature of Connecticut granting a rehearing in a case where the court of probate had decided against the validity of a will; and it was held that as the statute did not divest the title of either party, it might be objectionable as an exercise of judicial power, but certainly did not contravene the constitutional prohibition of *ex post facto* laws and laws impairing the obligation of contracts. A like decision was made in *Garrison v. The City of New York*.³ A contract which is invalidated by fraud or through the breach of a dependent covenant, falls within a different category, and cannot be legislatively confirmed without impairing the obligation as regards the injured party, who is entitled to elect between a rescission of the agreement, and proceeding under it for damages. A law confirming a conveyance or lease which has become voidable through the non-fulfilment of a condition, or forbidding a re-entry for the breach, would obviously be unconstitutional, as taking away a remedy implied in or given expressly by the contract.

The question what are *ex post facto* laws and laws impairing the obligation of contracts, was until recently of the more importance because the prohibition of such legislation was the only safeguard afforded by the National Constitution against arbitrary and retroactive legislation by the States. An act of assembly might consequently be in direct conflict with the rule that no one shall be deprived of life, liberty, or property without due process of law, and yet leave the

¹ *Schenly v. The Commonwealth*, 36 Pa. 29; *Grim v. The School District*, 57 Pa. 433; *Evans v. Montgomery*, 4 W. & S. 218.

² 3 Dallas, 386.

³ 21 Wallace, 196. See *post*, p. 846.

Supreme Court of the United States powerless to correct the error, and obliged to treat it as a legal if not legitimate exercise of sovereignty. We are thus brought to a consideration of the effect of the Fourteenth Amendment, which is the subject of the ensuing lecture.

LECTURE XXXIV.

The Fifth and Fourteenth Amendments. — Source and Meaning of the Phrase "Due process of law." — Synonymous with the *Judicium parium suorum* and *Lex terræ* of Magna Charta. — As embodied in the Amendments it operates as a Restraint on the States and on all the Branches of the Federal Government. — The Fifth and Fourteenth Amendments have a wider Scope than the Prohibition of *ex post facto* Laws and Laws impairing the Obligation of Contracts. — What constitutes the Deprivation which they forbid. — It need not consist in an Actual Taking or Imprisonment. — Nature and Scope of the Police Power. — It includes Acts which are necessary for the Protection of Health, Order, Liberty, and Property. — Belongs generally to the States, and not to Congress. — Includes Property employed for Public Purposes. — Regulation of Railway Fares and Charges. — What is necessary, a Judicial Question. — Monopolies. — Destruction of Property to prevent it from falling into Hostile Hands, or the Spread of Fire or Infection. — The Operation of the Police Power during Insurrection or an Invasion as Martial Law. — The Fifth and Fourteenth Amendments applicable to Prospective as well as Retroactive Legislation.

THE only restriction, under the Constitution as originally framed, on the power of the States over contracts and property, in whatever form, was the prohibition of *ex post facto* laws and laws impairing the obligation of contracts, and it so remained for many years; for although the Fifth Amendment soon afterwards provided that "no person shall be deprived of property without due process of law," it was confined to the General Government, and did not operate as a restraint on the States.¹ It followed that if a State legislature usurped the judicial function, took private property for public use without compensation, enforced an invalid contract,

¹ See *ante*, pp. 510, 532.

or sported with vested rights by any means short of an *ex post facto* law or law impairing the obligation of contracts, the sufferer might seek redress in the local tribunals, but could not appeal to the national judiciary.¹ The grievance was hypothetical rather than real, because the States seldom abused their powers, and justice was evenly administered in the courts; but when the South was prostrated by the Rebellion, the leaders of the dominant party resolved on measures that would tend to keep them in power, and might be necessary for the protection of the colored race. The political adventurers who were raised to office through the operation of the Reconstruction Acts misused their opportunities, and there was reason to apprehend that the whites would regain their ascendancy, and might exclude the negroes from the polls or refuse to admit them to the jury-box. The Fourteenth Amendment was accordingly proposed by Congress and ratified by the legislatures of the various States, although it would in all probability have been rejected had it been left to a popular vote. The first section reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws." Agreeably to the second section, "When the right to vote . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." It was soon afterwards provided, by the Fifteenth Amendment, that the right of citizens of the United States to vote should not be denied or abridged by

¹ See *ante*, p. 744.

the United States or by any State on account of race, color, or previous condition of servitude.¹

The revolution worked by these amendments is a momentous one, and must be judged by consequences which time alone can disclose. The gift of political equality to a people who are not allowed to stand at the same social level is a doubtful boon, which may engender discontent and animosity rather than gratitude. If the colored race achieve distinction at the Bar, on the Bench, in the pulpit, and in the halls of Congress, or amass wealth in trade, they will feel and resent their exclusion from the society of men who may be beneath them in education and intellect, and still more the denial of the connubium, which was a fruitful cause of offence in antiquity. The problem might be solved through intermarriage, which would fuse both races into one; and the statutes which require children of both colors and sexes to be educated in the same schools, tend in that direction. But the difficulty would recur in another form, because there are comparatively few persons of African descent in the Northern States, and if the color-line came to be drawn in the latitude of Washington, sections differing as widely in complexion and descent as in climate and productions might find it impracticable to co-exist under the same government. A similar and still more momentous question would have arisen on the Pacific coast from the immigration of the Chinese, but for the recent legislation of Congress.²

To trace all the bearings of these amendments would unduly enlarge this work; but it is material to inquire what is the deprivation which the Fourteenth Amendment forbids, and what the due process of law which it contemplates. The authorities cited on this head bear equally on the Fifth Amendment, which imposes a like restraint on Congress.

To answer these inquiries we must revert to *Magna Charta*, as expounded in the *Second Institutes* by Lord

¹ See *ante*, p. 509.

² See *Chew Hong v. United States*, 112 U. S. 536, 577; and *ante*, pp. 123, 472.

Coke, and critically considered in the instructive Constitutional History of England by Canon Stubbs.¹ "No freeman shall be taken or imprisoned or disseized or be outlawed or exiled or anywise destroyed, but by the lawful judgment of his peers or by the law of the land." Such is the emphatic language of the thirty-ninth section; and the fortieth declares, "To none will we sell, to none will we deny or delay, justice or right." The *lex terræ* here spoken of is the customary or common law, which then as now was claimed as a birth-right by every Englishman, or as it was paraphrased in the statutes of Edward III., cited in the Institutes, due "process of law;" and the *judicium parium suorum* signifies, according to the same authority, the verdict of his equals, that is, of men of his own condition, or, as we should now say, trial by a jury not selected arbitrarily, but drawn from the body of the county. These "famous and precious clauses" were to a great extent an enunciation of principles common to all the Germanic tribes and had been declared in like terms by the successors of Charlemagne; but they gained in value and significance through the extension of the privileges which they conferred, beyond the class who won and held their lands by the sword, to every free man on English soil.² Although originally designed as checks on the executive, judicial, and legislative functions as then centred in the king in council,³ they now operate as restraints on all the branches of our government.⁴ They are venerable from their antiquity and for the service which they have rendered to the cause of freedom for many centuries and on both sides the Atlantic, and interwoven with the institutions of the English-speaking race as now disseminated throughout the globe. Time has given them a sanction which is wanting to new-invented formulas; and when understood and applied

¹ Stubbs, Constitutional History, vol. i. ch. xii. p. 603.

² Ibid. ch. xii. p. 603.

³ Ibid. ch. xiii. p. 713. See *ante*, p. 148.

⁴ United States v. Lee, 106 U. S. 196; Poindexter v. Greenhow, 114 Id. 285; Westervelt v. Gregg, 12 N. Y. 202, 212; Norman v. Heist, 5 W. & S. 173; Wynehamer v. The People, 13 N. Y. 378, 433.

aright, they afford a protection against arbitrary power which includes all that is essential in the other constitutional safeguards and renders them superfluous. When it is said, in effect, that no one shall be deprived of any natural right save by the judgment of a duly constituted tribunal proceeding conformably to established rules and principles, and with an opportunity for a trial by jury if the question is one of fact, all has been said that is possible to human foresight, and the rest must be left to the good sense and virtue of the people and of those to whom they intrust the reins of government.

The organic laws of the various States contain provisions which sometimes, as in the case of Maryland, simply follow the language of Magna Charta, that no man shall be taken or imprisoned or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land; and in other instances substitute due process of law, or the due course of law, as giving in brief and comprehensive terms the substance of the entire clause.¹

Notwithstanding any seeming diversity of phraseology, all tend to the same end, and are designed "to protect the citizen from the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."²

¹ *Murray v. Imp. Co.*, 18 Howard, 276; *Craig v. Kline*, 65 Pa. 413; *Wynehamer v. The People*, 13 N. Y. 378, 433; *Cooley on Constitutional Limitations*, ch. xi. p. 35.

² See the *Bank of Columbia v. Oakley*, 4 Wheaton, 235.

Among the many able expositions of this safeguard there is none finer or more apposite than that given by Sharswood, J., in *Palaiet's Appeal*, 67 Pa. 479, 485:—

"Retrospective legislation is certainly not in itself unconstitutional, unless so far as it has an effect prohibited by the fundamental law. If, however, an act of assembly, whether general or special, public or private, operates retrospectively to take what is by existing law the property of one man, and without his consent transfer it to another, with or without compensation, it is in violation of that clause in the Bill of Rights, Constitution, Art. IX., sect. 9, which declares that no man 'can be deprived of his life, liberty, or property, unless by the judgment of his

It results from the language held in *Palairet's Appeal*,¹ and a long line of authorities, that “by the law of the land,”

peers or the law of the land.’ If this is true of a person accused of crime, to whom literally the words apply, *à fortiori* is it so as to one against whom no accusation is made. By the ‘law of the land’ is meant, not the arbitrary edict of any body of men, not an act of assembly, though it may have all the outward form of a law, but due process of law, by which either what one alleges to be his property is adjudged not to be his, or it is forfeited upon conviction by his peers of some crime for which by law it was subject to forfeiture when the crime was committed. If this be not so, every restriction upon legislative authority would be a vain formula of words, without life or force. For what more can the citizen suffer than to be ‘taken, imprisoned, disseized of his freehold, liberties, and privileges, be outlawed, exiled, and destroyed, and be deprived of his property, his liberty, and his life,’ without crime? It will not have escaped notice that in the clause of the Constitution referred to, property is put in the same category with liberty and life; and if an act of assembly can deprive a man of his property without a trial and judgment for even legal cause of forfeiture, it may in like manner deprive him of his life or his liberty, imprison him in a dungeon, or hang him without judge or jury. It is true that there are other more special declarations which give additional securities to liberty and life; but by classing all three together in this provision of the fundamental law, the people have declared their equal inviolability. There are also other special provisions as to security of property adapted to the dangers with which in a democratic form of representative government it is more especially threatened. But neither those clauses which relate to life and liberty, nor those which regard property, weaken the power of this grand primary inhibition which the sturdy barons of England, arms in hand, wrested from their sovereign at Runnymede: ‘Nullus liber homo capiatur vel imprisonetur aut disseisiatur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruat; nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terræ.’ This is still the corner-stone of our liberties. It becomes us to watch it with the greatest vigilance; not to suffer it to be undermined on any pretext, however specious. To this the most solemn sanction of our official oath applies with the greatest force; for while other parts of the Constitution may be merely directory, the people have most solemnly and emphatically said as to the Ninth Article, ‘To guard against transgressions of the high powers which we have delegated, we declare that everything in this

¹ 67 Pa. 479.

or the equivalent words, "due process of law," we are not to understand a statute passed to work the wrong, or requiring the judiciary to make a particular decree without regard to

article is excepted out of the general powers of government, and shall forever remain inviolate.' It has become, then, a fundamental axiom of constitutional law, not only in this, but in every other State of this Union, that the legislative power cannot, either directly or indirectly, without the consent of the owner, take private property for merely private use, with or without compensation.

"In a case arising in Rhode Island, which, without a written Constitution, except her charter of 15 Car. II., which invested the General Assembly with power to make laws 'so as such laws, etc., be not contrary and repugnant unto, but as near as may be agreeable to the laws of England, considering the nature and constitution of the place and people there,' Mr. Justice Story, delivering the opinion of the Supreme Court, held this language: 'In a government professing to regard the great rights of personal liberty and of property, and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away without trial, without notice, and without offence. Even if such authority could be deemed to have been confided by the charter to the General Assembly of Rhode Island as an exercise of transcendental sovereignty before the Revolution, it can scarcely be imagined that that great event could have left the people of that State subjected to its uncontrolled and arbitrary exercise. That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.' He adds, 'We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.' *Wilkinson v. Leland*, 2 Peters, 657. See *Varick v. Smith*, 5 Paige, N. Y. 137; *Hoke v. Henderson*, 4 Devereaux, 1; *Norman v. Heist*, 5 W. & S. 171; *Pittsburg v. Scott*, 1 Barr, 314; *Lamberton v. Hogan*, 2 Id. 24; *Brown v. Hummel*, 6 Id. 86; *Dale v. Medcalf*, 9 Id. 108; *Austin v. Trustees of University*, 1 Yeates, 260; *Concord R. R. Co. v. Greely*, 17 N. H. 57; *Gillan v. Hutchinson*, 16 Cal. 103; *Coffin v. Rich*, 45 Me. 509; *Southard v. Central R. R. Co.*, 2 Dutch. 13; *Kelly v. McCarthy*, 3 Bradf. 7; *Powers v. Bergen*, 2 Sel. 368; *Greenough v. Greenough*, 1 Jones, 489; *McCabe v. Emerson*, 6 Harris, 111; *Bolton v. Johns*, 5 Barr, 149."

principles, but "the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of general rules which govern society. Everything which may pass under the form of an enactment is not the law of the land. Such was the definition given by Webster *arguendo* in the Dartmouth College Case; and it has been followed throughout the subsequent course of decision.¹

In Palairot's Appeal, an act authorizing the extinguishment of irredeemable ground-rents on the payment of their value as estimated by a jury, was sought to be sustained under the right of eminent domain and the power of the legislature to regulate property and modify its incidents. The court held that the former power was confined to taking for public use, and that while the latter may be exercised prospectively if the legislature think fit, "the cases abundantly show that whenever the operation of any general regulation is to extinguish or destroy that which, by the law, is the property of any person, so far as it has that effect it is unconstitutional and void. Every power which the legislature possess is subject to the prohibition contained in the Declaration of Rights; and one of them, as we have seen, is that they cannot take the property of any one, except for public use, without his consent."

It is not less well settled that as the legislature cannot directly deprive any man of his property, so they cannot attain that end indirectly by conferring such a power on the courts, and requiring them to carry it into effect. This interpretation is abundantly sustained by Irvine's Appeal² and Palairot's Appeal, as well as by a multitude of authorities in the other States.

¹ Norman v. Heist, 5 W. & S. 173; Craig v. Kline, 65 Pa. 399, 413; Philadelphia v. Scott, 81 Id. 83, 90; Brown v. Hummell, 6 Id. 86, 91; Irvine's Appeal, 16 Id. 256; Shoenberger v. The School Directors, 32 Id. 34, 39; Taylor v. Porter, 4 Hill, 140; Westervelt v. Gregg, 12 N. Y. 202, 207; Clark v. Mitchell, 64 Mo. 564.

² 16 Pa. 256.

It is obvious that the Fifth and Fourteenth Amendments have a much wider scope than the clause which guards the sanctity of contracts. Agreeably to the one, no change can be made which impairs the obligation; agreeably to the other, a contract cannot be varied, whether the obligation is or is not impaired. The prohibitory clause simply protects *choses* in action and vested rights as between grantor and grantee. The amendments are a safeguard for property in whatever form, and may be as much violated by imposing an obligation where none exists, as by a refusal to enforce an existing obligation. A statute abrogating a right arising from or conferred by a grant or charter, conflicts with the guaranty of life, liberty, and property, as well as with that which protects the obligations of contracts. The greater includes the less; and had the prohibition of *ex post facto* laws and laws impairing the obligation of contracts not been expressed, it would for most practical purposes have been implied from the Fifth and Fourteenth Amendments and the like provisions in the State Constitutions. Hence, although the United States are not forbidden to impair the obligation of contracts, they are as unable as the States to take back what they have granted, or defeat a vested right arising from any other source.¹ The better opinion would consequently seem to be, that Congress cannot annul the franchises which they have conferred on a corporation or an individual by repealing the grant or charter, although it does not follow that this principle would cover a collateral stipulation for exemption from taxation, which may be advantageous, but is not essential to the exercise or enjoyment of the grant.

In the Sinking-Fund cases, Waite, C.-J., said: "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligations of contracts; but equally with the States they are prohibited from depriving persons or corporations

¹ The Sinking-Fund Cases, 99 U. S. 718; *Hepburn v. Griswold*, 8 Wallace, 603; *Shollenberger v. Brinton*, 52 Pa. 9.

of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they, by legislation, compel the corporation to discharge its obligations in respect to the subsidy bonds, otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands or in the contract for the subsidy bonds without the consent of the corporation."

It is nevertheless clear that Congress may exercise the powers which have been conferred upon them for governmental purposes, although rights arising *ex contractu* are thereby impaired. A bankrupt law or law debasing the standard of the coinage, a declaration of war or an embargo, is not unconstitutional, although it cannot be carried into effect without suspending, varying, or annulling prior contracts.¹ Were Congress to enact that eighty-three cents worth of silver should be equal to one hundred cents worth of gold, and a legal tender at that rate for contracts payable in lawful money of the United States, the law would be contrary to good faith, policy, and morals, but none the less binding between debtor and creditor. In *Hepburn v. Griswold*, Chase, C.-J., made a distinction in this regard between the express and implied powers of the government, which is not sustained by the subsequent course of decision.

The Constitution does not define the deprivation which it prohibits;² but the authorities establish that it need not be entire, or consist in the dispossession of the owner or destruction of the thing, and may, on the contrary, arise from an act which renders the thing less useful or valuable, or a law

¹ *Shollenberger v. Brinton*, 52 Pa. 9; *Evans v. Eaton*, 1 Peters C. R. 322; *Borie v. Trott*, 5 Philadelphia, 370. See *ante*, p. 575.

² See *Munn v. Illinois*, 94 U. S. 113.

forbidding its appropriate use and enjoyment, although the owner is not dispossessed.¹ Backing the water of a stream on a man's land, or diverting the stream from his land, is consequently a taking or deprivation, whether the dam is erected on his land or elsewhere;² and so of acts which, though done off the land, constitute a nuisance and render it less valuable pecuniarily, or unfit for habitation.³ It is immaterial, in this regard, that the act complained of is done under an authority conferred by law and for a public use, if it is unattended with compensation and transcends the limits within which an owner may exercise his own rights without being responsible for the consequences to others.⁴ If a legislative grant may render that which was public property — as, for instance, a highway or navigable stream — so far private that the grantee may use it for any purpose which would be lawful were it absolutely his own, it can do no more, and will not warrant any act that occasions loss to others and for which ownership is not a justification at common law.⁵ Such a statute may consequently be a defence to a civil or criminal suit at the instance of the State, but not to the claim of a citizen for damages for a special inconvenience or discomfort to him in excess of that occasioned to the community at large, unless the act is done by virtue of the right of eminent domain, and then only to the extent of limiting the recovery to compensation for the pecuniary loss.⁶ In *The Baltimore & Potomac R. R. Co. v. The Fifth*

¹ *Wynehamer v. The People*, 13 N. Y. 378; *The People v. Otis*, 90 Id. 48; *In re Jacobs*, 98 Id. 98, 105; *The People v. Marx*, 99 Id. 377; *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166; *The Bridge Co. v. The United States*, 105 U. S. 502.

² See *ante*, pp. 383, 388, 398.

³ *Pumpelly v. The Green Bay Co.*, 13 Wallace, 166; *Sinnickson v. Johnsons*, 17 N. J. 151; *The Baltimore & Potomac R. R. Co. v. The Fifth Baptist Church*, 108 U. S. 317, 333.

⁴ *Sinnickson v. Johnsons*, 17 N. J. 151; *Crittenden v. Wilson*, 5 Cowen, 165.

⁵ See *ante*, p. 413.

⁶ See *Rigney v. Chicago*, 102 Ill. 79; *The Baltimore & Potomac R. R. Co. v. The Fifth Baptist Church*, 108 U. S. 317; and *ante*, p. 418.

Baptist Church the suit was brought to recover damages for the injury and annoyance to the plaintiffs in the use of their church as a place of worship by smoke, dust, and noises proceeding from the defendants' works and locomotives; and it was held not to be a defence that the company were authorized by Congress to bring their tracks within the limits of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of their road, and that the engine-house and repair-shop complained of were skilfully constructed, the chimneys higher than required by the building regulations of the city, and that as little smoke was emitted as the nature of the business would permit.

It was also held that the depreciation of the plaintiff's property was not the only element to be considered in assessing the damages, and might, indeed, be entirely disregarded. The plaintiffs were entitled to recover because the inconvenience and discomfort caused to the congregation tended to destroy the use of the building for the purposes for which it was erected. The property might be valuable and salable for other purposes were the church entirely unfitted for public worship by the noise, smoke, and odors of the defendants' workshop. But, as the court below properly instructed the jury, the congregation had the same right to the comfortable enjoyment of their house for church purposes that an individual has to his own house; and the discomfort and annoyance in its use for those purposes was a primary consideration in allowing damages.

The conclusion reached under the last head does not appear to be altogether sound. When a public and private use conflict, the latter must give way, because the party who suffers from the deprivation is not entitled to weigh his convenience against the State's, and should be content with a sum which will enable him to establish himself as comfortably elsewhere. A statute is not a justification for acts done for a private purpose which would amount to a nuisance at common law; and the wrongdoer is answerable for all the consequences and may be compelled to desist by an in-

junction or repeated punitive verdicts; but the application of such a rule to acts done under a legislative authority for public purposes would frustrate the right of eminent domain. Had the railroad company taken the church property for the construction of its workshops, they could not have been compelled to pay more than the market value; and it is not easy to see how their liability or the injury to the congregation could be greater from acts which rendered the building less suitable and useful for religious services. The court seem to have wavered between holding that Congress could not confer the authority claimed by the defendants, and holding that the latter had so far exceeded the authority conferred by Congress that the acts complained of could not be upheld as essential to the exercise and enjoyment of their franchise.¹

To render a legislative command a defence to a civil or criminal proceeding for a deprivation without due process of law, it must be one which the legislature can constitutionally issue; that is, relate to a public right, or if private rights are concerned, be for a public purpose and attended with compensation. Such a mandate will not, therefore, be a justification for an act injuriously affecting health, which is covered by the clause protecting life, and cannot be arithmetically computed or paid for in currency. The legislature will not be presumed, in providing for the construction of a reservoir as a feeder for a canal, to have intended to authorize a malarious pool which infects the neighborhood; but if such be their purpose, it should be disregarded by the courts, and cannot be pleaded to an indictment for the nuisance.

¹ This decision stands in marked contrast to *Lippincott v. Pennsylvania R. R. Co.*, 19 Weekly Notes, 513 (see *ante*, p. 423). In both instances the acts complained of were done on land belonging to the defendants under an authority conferred by the legislature; but while in the latter the court questioned, if they did not absolutely deny, the right to recover, unless the noise produced by the defendants' locomotives exceeded that which would have been occasioned by hauling all the freight which passed over the railroad in carts past the plaintiff's door, he was held entitled in the former to compensation exceeding the pecuniary loss, and for prospective injury as well as that actually inflicted.

The point has been decided differently in Pennsylvania, where the courts proceed on the assumption that the clause requiring compensation for property taken in the exercise of the right of eminent domain should be read as meaning that property may be injured or destroyed without compensation, if it be not taken; and it is held to follow, that a recovery cannot be had for any injurious consequence of the appropriation of land to public use which does not amount to an occupation of the premises and dispossession of the owner.¹

It is notwithstanding clear, as I have already stated, that the prohibition is not confined to an actual taking, but includes every enactment which deprives the owner of the rights in which property consists, or precludes him from putting his land or goods to their appropriate use.² He cannot, save in the due exercise of the police power, and where the case imperatively requires it, be forbidden to sell, or directed how to hold or enjoy; nor can the use or sale be placed under restrictions which amount to a prohibition, or render the property valueless or useless. If the legislature can thus restrict the future acquisitions of the citizen, it has no such power over his existing rights.³

As was observed in *Wynehamer v. The People*,⁴ "property" is the right to possess, use, enjoy, and dispose of a thing. The term, although frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it.⁵ A man therefore may be deprived of his property in a chattel without its being seized or physically destroyed or taken from his possession. Whatever subverts his rights

¹ *The West Branch Canal Co. v. Mulliner*, 68 Pa. 357; *The Commonwealth v. Reed*, 34 Id. 275; *Monongahela Navigation Co. v. Coons*, 6 W. & S. 101; *The Philadelphia & Trenton R. R. Co. v. Wharton*, 45. See *ante*, p. 386.

² *In re Jacobs*, 98 N. Y. 98, 105; *The People v. Otis*, 90 Id. 48; *The People v. Marx*, 99 Id. 397. See *ante*, pp. 383, 756.

³ *In re Jacobs*, 98 N. Y. 98, 105; *Wynehamer v. The People*, 13 Id. 378, 391, 437; *Palaiet's Appeal*, 67 Pa. 479, 494.

⁴ 13 N. Y. 378, 433.

⁵ *Bouvier's Law Dict.*, *sub voce* Property; 1 Bl. Com. 138; *Webster's Dict* See *ante*, p. 357.

in regard to it, annihilates his property in it. A law providing in regard to any article in which a right of property is recognized, that it shall not be sold, used, or kept in any place whatsoever within the State, would fall directly within the letter of the constitutional inhibition, as it would in the most effectual manner possible deprive the owner of his property, without the interposition of a court or the use of any process whatever.

Such laws, therefore, as were recently made by Parliament to regulate the relation of lessor and lessee in Ireland, by compelling the landlord to pay for improvements made without his consent, and to accept whatever rent a tribunal appointed by the Government might designate as fair, instead of that reserved in the lease, would be the deprivation which *Magna Charta* condemns and is forbidden by the Constitution of the United States; nor can Mr. George's theories as to the ownership of land be carried into effect so long as the United States stand as at present constituted, and the judiciary enforce the organic law.¹

It is not less well settled that whatever is essential to maintain order, to prevent the growth and spread of disease, or for the suppression of crime, — in short, to guard against the ills which assail social and private life, is lawful, although the power cannot be carried further than the circumstances imperatively require.² It is on this ground of a necessity transcending ordinary rules that the law forbids the storage of gunpowder or other explosive compounds in populous neighborhoods, regulates or prohibits the sale of poisons, provides for the abatement of nuisances, and sanctions arrests without a warrant where the criminal might otherwise escape. And as necessity is a law for itself, a private citizen may, when the emergency does not admit of delay, do what is requisite, without waiting for an authority from the legislature or the order of a court.³ Though an arbitrary arrest

¹ See *Palairot's Appeal*, 67 Pa. 479.

² *Palairot's Appeal*, 67 Pa. 479; *Wynehamer v. The People*, 13 N. Y. 399, 435.

³ *Ashley's Case*, 12 Reports, 92; *Wakely v. Hart*, 6 Binney, 316;

without a warrant is ordinarily a deprivation of liberty and forbidden by the Constitution, there are cases where it is not only justifiable, but a duty to the community. Every man may act as a constable, in case of need, to prevent the commission of a crime or the escape of the offender; and if the latter resists and kills the person who is endeavoring to take him into custody, it will be murder.¹ Should the accused be detained for an unreasonable time by his captors without being brought before a magistrate, it may be ground for an action; but the court will, instead of discharging him on a *habeas corpus*, hand him over to the proper authorities, to be dealt with in the due course of law.² It has been justly said that society has the right of self-preservation which belongs to individuals; and it is not less true that an individual may intervene on behalf of the community when the danger is imminent and cannot be averted without the immediate use of force. It is on this ground that martial law may be proclaimed by the commander of a besieged town or invaded district, fire-arms employed to disperse a mob, or buildings destroyed to prevent the spread of a conflagration; and the statutes which direct or regulate acts of this description confer no power that might not be exercised though they were not enacted. "For the commonwealth a man shall suffer damage; as for saving a city or town, a house shall be pulled down if the next be on fire, and the suburbs of a city in time of war shall be plucked down, and a thing for the commonwealth every man may do without being liable for an action, as it is said in 3 Henry VIII., vol. 15; and in this case the rule is true, *Princeps et respublica ex justa causa possent rem meam auferre*."³ The right of jettison to save a vessel laboring in a storm and preserve the lives of the crew and passengers

Brooks v. The Commonwealth, 61 Pa. 353, 358; *Holly v. Mix*, 3 Wend. 350, 353; *Rex v. Pinney*, 3 C. P. 263.

¹ *Ex parte Krans*, 1 B. & C. 258; *The State v. Rutherford*, 1 Hawks, 457; *Ruloff v. The People*, 45 N. Y. 213; *Brooks v. The Commonwealth*, 61 Pa. 353.

² *Ex parte Krans*, 1 B. & C. 258.

³ *Mouse's Case*, 12 Coke, 63.

was referred in *Mouse's Case*¹ to these principles. It is immaterial that the owner of the goods is present and forbids the sacrifice. Should he bring trespass, the necessity may be pleaded in bar.

In *Meeker v. Van Rensselaer*² the court held that a building containing numerous small apartments, inhabited by a multitude of lodgers whose filthy habits were calculated to breed infection and increase the ravages of the Asiatic cholera, might be thrown down by persons residing in the neighborhood, although the authority which was alleged to have been granted by the Board of Health could not be adduced in evidence for the want of formal proof. The court said that this was not material, because the defendants did not need any authority except that arising from the circumstances. The acts which authorize sheriffs, magistrates, or other officers to destroy infected clothing or to tear down buildings in order to prevent the spread of a conflagration, rested on the inherent right of self-defence, and simply regulated a power which might be exercised on the ground of necessity though it were not conferred in terms.³ "It is enough," said Comstock, J., in *Wynehamer v. The People*, "to say of such enactments that they are founded upon and are regulations of the common law right of every man to destroy property in case of immediate and overwhelming necessity to prevent the ravages of fire and pestilence."⁴ Statutes of this description merely appoint a municipal agent to judge of the emergency, and direct the performance of acts which any individual might do at his peril without any statute at all." Hence one who acts in cases of the above description without being authorized thereto by a statute,

¹ 12 Coke, 63.

² 15 Wend. 397.

³ See *Russell v. The Mayor of New York*, 2 Denio, 461; *The Mayor of New York v. Lord*, 17 Wend. 285; 18 Id. 127; *Wynehamer v. The People*, 13 N. Y. 378, 401, 439; *Meeker v. Van Rensselaer*, 15 Wend. 397; *The American Print Works v. Lawrence*, 23 N. J. Law, 590; *The Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Mitchell v. Harmony*, 13 Howard, 115; *Respublica v. Sparhawk*, 1 Dallas, 337.

⁴ 2 Kent's Com. 339.

and one who relies upon the authority of such a statute as a justification, stand upon the same basis, and must show that there was reasonable and probable cause for belief in the imminence of a calamity which could be averted in no other way.¹

In like manner, the goods of a citizen may be destroyed in time of war, to prevent them from falling into hostile hands, because they are, under these circumstances, potentially enemy's property, and liable to be dealt with as already his.² It is not enough, on the one hand, that the act was done at the command of a military superior or under a statutory declaration of martial law;³ nor will the justification fail, on the other, because the defendant acted without a commission or authority from the government.⁴ The material question is, Had he reasonable and probable cause

¹ "It is contended," said Johnson, J., in *Wynehamer v. The People*, 13 N. Y. 378, 439, "that the legislature has the conceded power to authorize the destruction of private property in certain cases for the protection of great public interests, — as, for instance, the blowing up of buildings during fires, and the destroying of infected articles in times of pestilence, — and that the legislature is necessarily the sole judge of the public exigency which may call for the exercise of this power. The answer is, that the legislature does not in these cases authorize the destruction of property, it simply regulates that inherent and inalienable right which exists in every individual to protect his life and his property from immediate destruction. This is a right which individuals do not surrender when they enter into the social state, and which cannot be taken from them. The acts of the legislature in such cases do not confer any right of destruction which would not exist independent of them, but they aim to introduce some method into the exercise of the right. See the able opinion of Senator Sherman in *Russell v. The Mayor of New York*, 2 Denio, 461. It has never yet been judicially decided in this State, so far as I am aware, that the officers upon whom statutes of this kind purport to confer power to destroy buildings to prevent the spread of fires would be justified in exercising the power in a case where it could not be properly exercised independent of the statute; and it may well be doubted whether the legislature can add to the extent or force of the natural right."

² *Respublica v. Sparhawk*, 1 Dallas, 337; *Ford v. Surget*, 97 U. S. 605.

³ *Mitchell v. Harmony*, 13 Howard, 115.

⁴ *Respublica v. Sparhawk*, 1 Dallas, 333.

for believing that the measure was necessary to prevent a capture that would strengthen the hostile power? Such, also, is the test where private property is taken in furtherance of a military operation or to maintain the troops which have been levied by the government. The question whether the deprivation was necessary is one of fact for the jury, under the instructions of the court;¹ and the rule applies to the destruction of a building to prevent the spread of a fire.

Ordinarily, acts done by persons in arms against the government are tainted with the illegality of the end in view, and punishable by the criminal, or a ground for the recovery of damages under the civil law; but when an insurrection assumes the proportions of a civil war, the relations of the insurgents among themselves are the same as if they were the subjects of an alien and hostile power, and no one of them can maintain an action against another for the consequences of a state of things to which they all impliedly agreed. In *Ford v. Surget*,² an officer of the Confederate Government was accordingly held not to be answerable, after the suppression of the Rebellion, for the destruction of cotton which would otherwise have been captured by the Union troops. The Confederate statute set up as a defence was the act of a body unknown to the Constitution of the United States, and had no bearing on the case; but it was none the less true that the plaintiff had by voluntarily remaining in the territory occupied by the insurgents, identified himself with their cause, and must be regarded as consenting to any measure that could consistently be adopted by them in furtherance of the war which they were then waging against the government. This case affords a singular and convincing proof that such acts depend for their validity on the facts, and do not need the aid of legislation.

The problem in cases of this kind is to harmonize two essential principles, which, though tending to the same end, may sometimes appear discordant. On the one hand is the right of property, which has in all ages and everywhere been found necessary to the existence of society; on the other,

¹ *Mitchell v. Harmony*, 13 Howard, 115.

² 97 U. S. 605.

the not less necessary right of society to guard against acts which are injurious to individuals and the community at large; and while the Constitution expressly forbids the deprivation of the former, it impliedly authorizes measures that are requisite for the vindication of the latter.¹ Both are indisputable, and when severally considered, clear; the difficulty is to define what properly belongs to each, and which should in a given case prevail. As was observed in *Wynehamer v. The People*,² "It is certain that the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction. It is equally certain that the legislature can regulate trade in property of all kinds. Neither of these propositions is denied; but they necessarily lead to another,—that between regulation and destruction there is somewhere, however difficult to define with precision, a line of separation. All reasoning, therefore, in favor of upholding legislation which belongs to one class because it is often difficult to distinguish it from that which belongs to the other, must be fallacious, because it is simply reasoning against admitted conclusions." In drawing the line between these opposing considerations, regard may be had, as was pointed out in *Munn v. Illinois*,³ to the course of legislation prior to the declaration of independence, and when the organic laws of the several States were framed, and regulations which were then generally acquiesced in, viewed as not amounting to the deprivation which the Constitution forbids, although they might otherwise appear unconstitutional, as constituting a monopoly, or imposing an arbitrary restraint on the right of the citizen to fix the price of his services.⁴ This argument must not be pushed too far, because *Magna Charta* was simply a restraint on the power of the Crown, and it was not possible to bring an act of Parliament or of the Colonial legislatures to the test of a judicial application of the principles which it laid down.

¹ *Philadelphia v. Scott*, 91 Pa. 80, 85.

² 13 N. Y. 399.

³ 94 U. S. 113; *Munn v. Illinois*, 94 U. S. 113.

⁴ *The Butchers' Union Co. v. Crescent City Co.*, 16 Wallace, 42.

The power to make such regulations for intercourse, for the use of property, and for business as are requisite for health, order, and morals, which, as I have elsewhere noted, is designated as the police power, may be exercised incidentally by the United States in furtherance of the objects intrusted to their care, but for the greater part remains in the States; and the laws passed to carry it into effect belong to "that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government, all of which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State and those which respect turnpike roads, ferries, etc., are component parts. No direct general power over these subjects is granted to Congress, and they consequently remain subject to State legislation."¹

Two consequences flow from these premises, — one, that the police power may be exercised by a State as regards matters which are also within the authority of Congress, provided that lies dormant, and there is no conflict;² the other, that it cannot be exercised by Congress as to matters which are exclusively under the control of the States.³ And in *The United States v. De Witt*, an act of Congress rendering it a misdemeanor "to mix for sale naphtha and illuminating oils, or to sell petroleum inflammable at less than a prescribed temperature," was held to be void, as encroaching on the police power and purely internal commerce of the States.

The police power may be justly said to be more general and pervading than any other. It embraces all the operations of society and government; all the constitutional pro-

¹ *Gibbons v. Ogden*, 9 Wheaton, 203; *The Butchers' Union Co. v. Crescent City Co.*, 16 Wallace, 42; *Munn v. Illinois*, 94 U. S. 113. See *ante*, pp. 433, 490.

² *The License Tax Cases*, 5 Wallace, 471; *Butchers' Union Co. v. Crescent City Co.*, 16 Id. 42; *Munn v. Illinois*, 94 U. S. 113.

³ *United States v. De Witt*, 9 Wallace, 41.

visions presuppose its existence, and none of them preclude its legitimate exercise.¹ It is impliedly reserved in every public grant. Chartered rights and privileges are therefore, like other property, held in subordination to the authority of the government, which may be so exercised as to preclude the use or doing of the very thing which the company was constituted or authorized to manufacture or perform.² The legislature cannot be presumed to have intended to tie its hands in this regard in the absence of express words; but if such a purpose were declared, it would fail, as an attempt to part with an attribute of sovereignty which is essential to the welfare of the community.³

There is another offshoot of the multifarious and far-reaching police power,—that property, which, though private, is employed for public purposes, may be subjected to regulations which are essential to the public welfare or necessary to prevent abuse. Railway-cars, hackney-coaches, ferry-boats, and in general all that appertains to the occupation of a common carrier, are within the principle, which applies to railways, turnpikes, and canals, and also to the hotels and public warehouses which receive the goods or passengers at the termination of the transit.⁴

No one questions the right of a State or of a municipal corporation to prescribe the maximum of speed at which railway-trains or carriages may pass through a town or city; and a like power may be exercised in regard to vessels when sailing through a crowded channel.⁵ Railways, if not public prop-

¹ *The Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 751; *The License Cases*, 5 Howard, 583; *Munn v. Illinois*, 94 U. S. 113; *The Commonwealth v. Alger*, 7 Cushing, 53, 84.

² *The Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Beer Co. v. Massachusetts*, 97 Id. 25; *Galena R. R. v. Appleby*, 28 Ill. 283; *Ohio R. R. Co. v. McClelland*, 25 Id. 140. See *ante*, p. 620.

³ *Dingman v. The State*, 51 Ill. 277.

⁴ See *Munn v. Illinois*, 94 U. S. 113.

⁵ See *Vanderbilt v. Adams*, 7 Cowen, 351; *The Buffalo R. R. Co. v. Buffalo*, 5 Hill, 209; *Thorpe v. The Rutland & Burlington R. R. Co.*, 27 Vt. 156; *The Pittsburgh R. R. Co. v. The S. W. Pennsylvania R. R. Co.*, 77 Pa. 175, 186.

erty, are public highways, and as such subject to public supervision;¹ and the legislature may require a railway company to fence its road, provide gates at the crossings, or empower the courts to regulate the intersection of two or more railways at grade, or forbid it altogether;² and in *The Missouri & Pacific Railway Co. v. Humes*, the court held that such companies may be legislatively compelled to provide gates, fences, and cattle-guards, and be mulcted in double damages for any loss which ensues from a disregard of the provisions of the statute. The legislature may well visit the breach of any law with a fine, and it is immaterial that the amount is to be paid to the sufferer instead of into the State treasury.

It has also been decided, on grounds which are not equally clear, that the legislature may regulate the rates of a railway company³ for freight or passengers, or the charges for the storage of goods in a public warehouse.⁴ In *Munn v. Illinois*,⁵ a clause in the State Constitution declaring "all elevators and warehouses, where grain or other property is stored or hoisted for a compensation . . . to be public warehouses," was followed by an act of assembly regulating the use of the buildings dedicated to such purpose, and providing the maximum charges for the storage and handling of grain; and it was held that the statute did not operate

¹ *The Pittsburg R. R. Co. v. The S. W. Pennsylvania R. R. Co.*, 77 Pa. 173.

² *The Pittsburg R. R. Co. v. The S. W. Pennsylvania R. R. Co.*, 77 Pa. 173; *The Pennsylvania R. R. Co. v. Riblett*, 66 Id. 164; *Cowen v. The New York & Erie Railway Co.*, 13 N. Y. 42; *Smith v. The Eastern R. R. Co.*, 35 N. H. 356; *Bulkley v. The New York & New Hampshire R. R. Co.*, 27 Conn. 479; *Thorpe v. The Rutland & Burlington R. R. Co.*, 27 Vt. 143; *The Missouri & Pacific Railway Co. v. Humes*, 115 U. S. 522.

³ *The Railroad Commission Cases*, 116 U. S. 307, 325; *The Railroad Co. v. Maryland*, 21 Wallace, 456; *Winona R. R. Co. v. Blake*, 94 U. S. 180; *The Chicago R. R. Co. v. Iowa*, Id. 155; *Peik v. The Chicago R. R. Co.*, Id. 164.

⁴ *Munn v. Illinois*, 94 U. S. 113.

⁵ 94 U. S. 113.

as a deprivation, or conflict with any of the constitutional prohibitions against interference with private property.¹

¹ "Looking," said Waite, C.-J., "to the common law, whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief-Justice Hale, more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public, for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control. . . . It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did, was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage; and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriages and established his business before the statute or the ordinance was adopted.

"It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial, and not a legislative, question.

"As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are

Such regulations do not work the deprivation which the Constitution forbids, because in devoting his property to a public purpose the owner impliedly agrees that it shall be subject to public control so far as is requisite for the common good, and cannot complain of a law fixing the compensation for a service which is public. In the Railroad Commission Cases¹ the established doctrine of the Supreme Court of the United States was declared to be, in view of this case and the previous course of decision, that a State may regulate the charges of railway companies for the transportation of freight and passengers, provided the law does not operate as a regulation of the interstate or foreign commerce which is exclusively under the control of Congress;² and that if the power can be surrendered, the words employed must be express, or so clear as to leave no doubt as to the intention.

no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms or forego the use. But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one. We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts."

¹ 116 U. S. 317, 325.

² See *The Railroad Co. v. Maryland*, 21 Wallace, 456; *Winona R. R. Co. v. Blake*, 94 U. S. 180.

Such legislation may be eminently just as regards companies which have been chartered by the State or clothed with the power of eminent domain, because grants of this description not infrequently preclude the competition which is the security against over-charge in trade, but seems questionable when the way is left open to individual enterprise, and may, by deterring capitalists from putting their means within legislative control, end in raising the prices which it is intended to keep down. If, as the language of the Chief-Justice in *Munn v. Illinois* implies, the power extends to fixing the maximum rate of compensation for bakers and millers, it may extend to dealers in flour, meat, clothes, and other articles of prime necessity, and tend to scarcity rather than low prices and abundance.

The regulation must not, it has been said, be unreasonable, or be in effect a taking of private property for public use without compensation. "The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation."¹ Difficult as it may be to fix the limit, we may presume that it would be transgressed by an act reducing the rates of a railway company below the sum requisite to defray current repairs and expenses, and leave a surplus equal to the legal interest on the capital expended in the construction and equipment of the road.

All the powers of the States are held and must be exercised in subordination to the Constitution; and the right to prescribe the rates for the transportation of freight and passengers within a State must not so be exercised as to operate on interstate commerce, or prevent railway companies from making such contracts as they think proper for the carriage of goods through more than one State in one journey. The law was so held in the recent case of *The Wabash R. R. Co. v. Illinois*,² reversing *The People v. The Wabash R. R. Co.*,³ contrary to the dicta in some of the previous instances, which implied that so much of a railway as lies within a State may

¹ *The Railroad Commission Cases*, 116 U. S. 317, 333.

² 118 U. S. 557.

³ 104 Ill. 47.

be regulated as she thinks proper, although the cost of carrying goods into or through other States is thereby considerably enhanced.¹

Broad as is the police power, it is, like every other, subject to the restrictions imposed by the National Constitution and the organic laws of the several States.² It is paramount when the case falls within its scope; but the legislature cannot conclusively establish that such is the nature of the case, and their decision may, where there is a plain excess or usurpation, be reversed by the judiciary.³ This results from the constitutional provision that no man shall be deprived of life, liberty, or property without due process of law, which would be nugatory if a bald recital in an act of assembly could oust the jurisdiction of the courts.⁴

Men obviously should not be allowed to vend poisonous drugs as cordials;⁵ but the legislature cannot preclude the appropriate use of things innocent in themselves by stigmatizing them as poisonous, nor will a legislative declaration render that a nuisance which is not such within the legal definition of the term and according to the common experience of life and trade.⁶ The common law right to destroy bales of merchandise laden with infection, or provisions which have become unfit for food, may be sanctioned by a statute, and the exercise of it intrusted to the sheriff or the magistrates of a town; but it does not follow that fermented liquors can be included in this category on the assumption that every beverage which contains alcohol is hurtful, even when used in moderation.

¹ *Chicago R. R. Co. v. Iowa*, 94 U. S. 155, 163; *Peik v. Chicago R. R. Co.*, Id. 161, 177; *Wabash R. R. Co. v. Illinois*, 118 Id. 557, 567, 590. See *ante*, p. 453.

² *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Walling v. Michigan*, 116 Id. 446.

³ See Tiedeman on the Limitations of the Police Power, p. 489 (St. Louis, 1886).

⁴ *Wynehamer v. The People*, 13 N. Y. 398; *In re Jacobs*, 98 Id. 109; *Beebe v. The State*, 26 Ind. 501.

⁵ *Ex parte Yung Jon*, 28 Fed. R. 308.

⁶ *In re Jacobs*, 98 N. Y. 98, 109; *The People v. Marx*, 99 Id. 386; *Beebe v. The State*, 26 Ind. 501.

Nowhere has this police power been carried farther, or exercised with less regard for private rights, than in the numerous statutes which forbid the manufacture or keeping of intoxicating liquors for sale, and provide that they may be taken forcibly from the owners and destroyed. "Not only does the trade which is to-day lawful, become illegal through the enactment of the morrow, but the property which the dealer has on hand is declared a nuisance, which can neither be kept nor parted with, and which he must hasten to destroy if he would avoid the rigor of the criminal law."¹ The authorities are nevertheless clearly in favor of the power as regards property which is acquired subsequently to the enactment, and therefore with notice of the restrictions which it imposes.²

Notwithstanding these decisions, we may believe that to warrant the prohibition of a thing or calling, it must not only be susceptible of abuse, but one that cannot under ordinary circumstances be beneficially pursued or used.³ An act to improve the public health by prohibiting the manufacture of cigars in tenement-houses was held unconstitutional in *Re Jacobs*, because there was no connection between the end and the means employed, and it did not appear that making cigars was more injurious under such circumstances than when carried on in a crowded manufactory or workshop. So it was decided in *The People v. Marx* that the manufacture and sale of oleomargarine could not be prohibited on the ground that it might be fraudulently substituted for butter, and tended by reducing the price of that article to render the dairies of the State less profitable. Such a law impairs not only property, but infringes the liberty which, as guaranteed by the Constitution, "includes the right of every man to use his faculties

¹ See Cooley on Constitutional Limitations, ch. 16.

² *Bartemeyer v. Iowa*, 18 Wallace, 129; *Lincoln v. Smith*, 27 Vt. 328; *Gill v. Parker*, 31 Id. 610; *The Beer Co. v. Massachusetts*, 97 U. S. 25; *Foster v. Kansas*, 112 U. S. 201; *Reynolds v. Geary*, 26 Conn. 179; *Commonwealth v. Kendall*, 12 Cushing, 414; *Commonwealth v. Howe*, 13 Gray, 236; *Byers v. Olney*, 16 Ill. 36; *Jones v. The People*, 14 Id. 196.

³ *In re Jacobs*, 98 N. Y. 98; *The People v. Marx*, 99 Id. 377.

in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any customary trade or avocation.”¹ This is no new doctrine, but derived through Magna Charta, which was to a great extent declaratory of Teutonic freedom. It was applied in the Case of Monopolies, reiterated by Blackstone, came with the colonists from England, and is embodied in the organic laws of the Union and the several States.² Accordingly, the law will not allow rights of property to be wantonly invaded under the guise of a police regulation for the prevention of disease or to guard against a supposed or apprehended nuisance; and when it appears that such is not the real purpose or effect of the ordinance, the courts may intervene for the protection of the citizen.³ As was said in *Beebe v. The State*,⁴ the legislature cannot enlarge its power over property or pursuits by calling them a nuisance, or by enacting a definition of a nuisance that will cover them. “Whatever it has a right by the Constitution to prohibit or confiscate, it may thus deal with, without first declaring the matter to be a nuisance; and whatever it has not a right by the Constitution to prohibit or confiscate, it cannot thus deal with, even though it first declare it a nuisance.”

Such a conclusion would seem preferable to that reached in the *State v. Addington*,⁵ where a similar statute was upheld as a legitimate exercise of the police power to prohibit the manufacture of any commodity which may be imposed on buyers as of a different kind, and thus become an instrument of fraud. Agreeably to the view taken in this instance, “The test of the reasonableness of a police regulation prohibiting the making and vending of a particular article of food, is not alone whether it is in part unwholesome and

¹ See *In re Jacobs*, 98 N. Y. 98, 107; *The People v. Marx*, 99 Id. 377.

² *The Case of Monopolies*, 11 Coke, 34; 1 Bl. Comm. 134; *The Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 736, 762; *In re Jacobs*, 98 N. Y. 98, 107.

³ *In re Jacobs*, 98 N. Y. 98, 110; *Austin v. Murray*, 16 Pick. 121; *Watertown v. Mayo*, 101 Mass. 315.

⁴ 26 Ind. 501.

⁵ 12 Mo. App. 214, 228; 77 Mo. 118.

injurious. If an article of food is of such a character that few persons will eat it, knowing its real character; if at the same time it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no prejudice; and if, in addition to this, there is probable ground for believing that the only way to prevent the public from being defrauded into the purchasing of the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former, — then we think such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public, if in buying it they could distinguish it from the production of which it is the imitation. . . . The manufacturer may brand it with its real name. It may carry that brand into the hands of the broker or commission-merchant, and even into the hands of the retail grocer; but there it will be taken off, and it will be sold to the consumer as real butter, or it will not be sold at all. The fact that in the present state of the public taste, the public judgment, or the public prejudice with respect to it, it cannot be sold except by cheating the ultimate purchaser into the belief that it is real butter, . . . stamps with fraud the entire business of making and vending it, and furnishes a justification for a police regulation prohibiting the making and vending of it altogether.”

This decision was followed by the Supreme Court of Pennsylvania in the recent case of *Powell v. The Commonwealth*.¹ The court cited and relied on *The Commonwealth v. Waite*,² where the argument that inasmuch as it is lawful to sell pure milk or pure water, or both, the sale of milk and water mixed could not be made a penal offence, was overruled on the ground that since the sale of milk adulterated with water is customarily practised with a fraudulent intent, it is for the legislature to judge what laws are necessary to protect the people against such frauds. It followed that the wholesomeness of the article, when pure and genuine, was

¹ 19 Weekly Notes, 24; 114 Pa. 265.

² 11 Allen, 264.

irrelevant to an inquiry which depended on whether it could be rendered injurious by adulterations that could not readily be detected, and might be used as a means of imposition. This question was legislative. To hold otherwise would overthrow the police power, and defeat any law which appeared unwise to the judiciary. Gordon, J., dissented on the ground that if the legislature can prohibit the making and sale of one kind of pure and wholesome food because it may incidentally be put to an injurious use, they may prohibit the making and sale of every other kind, and their power would be absolute over the entire field of trade and business. Oleomargarine is beef fat, churned with milk, and colored with annatto. It is confessedly wholesome, and should be viewed favorably, as enabling men of scant means to procure a substitute for butter, which will render their bread more palatable.

Agreeably to the rule as laid down in *Wynhamer v. The People*,¹ if the legislature may, for any cause which is not manifestly illusory or absurd, declare that things of a certain kind are hurtful, and shall not thereafter be made, purchased, kept, or disposed of, they cannot lay down such a rule with regard to property which has been previously acquired. What the statute forbids in the one case is the acquisition of a right; in the other it abrogates a right which has already accrued, and will be invalid unless provision is made for compensating the parties who have expended money or labor on the faith of the pre-existing law.

Accordingly, in *Bartemeyer v. Wheeler*,² Miller, J., said that the solitary exception to the right of the State legislature to regulate or even prohibit the sale of intoxicating drinks, is a law operating so rigidly on existing property as to amount to a deprivation; and a like view was taken in *The Beer Co. v. Massachusetts*.³

Sound as the distinction may be within certain limits, it does not cover the entire ground, nor is it possible so to disentangle the future from the present. A law imposing restrictions on future acquisitions necessarily impairs present ownership, because no one can sell that which others are not

¹ 13 N. Y. 390.

² 18 Wallace, 129.

³ 97 U. S. 25.

allowed to purchase or precluded from turning to account. If the members of a community are forbidden to dispose of what they buy, each is practically as much prevented from selling as if such an injunction was laid in terms. The guaranty of life, liberty, and property in the Fourteenth Amendment does not admit of such a narrow interpretation, in view of the purpose for which it was originally framed or of that for which it was re-enacted, and is, on the contrary, prospective as a whole and in its several parts. No one supposes that the barons meant that the property which they subsequently acquired should, any more than the property which they then held, lie open to the greed and exactions of John or of the kings who might fill his place, or that a statute embodying the communistic axiom that property is robbery would have been less objectionable to the framers of our organic laws because it was limited to things subsequently acquired, and left existing rights undisturbed. This is the more clear because the deprivation of property and the deprivation of liberty are forbidden in the same clause, and with one and the same design;¹ and neither prohibition would be of much avail if it did not apply to future and prospective as well as present rights. Civil liberty does not simply mean that the citizen shall be exempt from servitude and incarceration; it implies that he shall be free in the choice and exercise of his calling or profession, and to follow any way of life that is not at variance with the rules of morals and the good order generally observed among civilized nations.² The Fourteenth Amendment, like the Thirteenth, was accordingly intended as a continuing guaranty against arbitrary legislation to each man during his allotted span and through successive generations.³ Such an inference is inevitable when we reflect that both prohibitions were drawn in view of the declaration that all men are endowed by their Creator with "certain unalienable rights, including life, liberty, and the pursuit of happiness," which implies that these privileges are

¹ *Dunn v. Burleigh*, 62 Mass. 24.

² *The People v. Marx*, 99 N. Y. 377.

³ *The Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 747.

inherited by every child that comes into the world, and are beyond the reach of legislation.¹ A law consigning children thereafter born to servitude would be as much a deprivation as if it applied to the existing generation. Such an abuse is impliedly forbidden by the Fourteenth Amendment as well as by the express terms of the Fifteenth; and the principle applies to every enactment which impairs the rights which these clauses are designed to secure.²

It is also clear that an attempt by Congress or a State legislature to create a monopoly—that is, to give an individual or body corporate an exclusive right to the pursuit or enjoyment of a trade or occupation—is invalid, because in entitling the grantee it necessarily deprives all others.³ This is not, as has sometimes been intimated, merely inferential from the spirit and objects of the Constitution, but depends on the clauses which protect liberty and life. Monopolies were declared to be illegal in the last year of Queen Elizabeth, in a well-known case reported by Coke;⁴ and although the power was subsequently usurped and abused by her successor, it was abolished by Parliament before the close of his reign. The question arose under grants from the Crown, but was decided on a principle which is obligatory on every

¹ See *The Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 757; *In re Jacobs*, 98 N. Y. 98, 107.

² *The Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 764.

Such nearly was the question which arose under the laws prohibiting the introduction of slaves into Kansas. Whether the right of property in man was or was not necessarily immoral or injurious, it was sanctioned by the Constitution of the United States and the general consent of the American people, and could not be divested without compensating the owners for the loss: but the legislature of a State or Territory might well declare that such a right was incompatible with the welfare of society as constituted within its borders, and that while the slaves which were already there should remain the property of the owners, no others should be introduced.

³ *City of Hudson v. Thorne*, 7 Paige, 261; *City of Chicago v. Rumpff*, 45 Ill. 90; *Norwich Gaslight Co. v. Norwich City Gaslight Co.*, 25 Conn. 19, 38; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; *Logan v. Payne*, 43 Iowa, 524.

⁴ 11 Rep. 84*b*.

branch of our government. As Popham declared in the case just cited, "A man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, any more than of his life." The right to pursue any customary trade or vocation is essential to life and liberty, and it is also property, — truths which are too often forgotten in these days of arbitrary strikes and "boycotting." "The property which every man has in his own labor, as it is the original of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder his employing this strength and dexterity in what manner he thinks proper, without injuring his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him."¹ This passage is cited by Mr. Justice Field in *The Butchers' Union Co. v. Crescent City Co.*,² and it would be difficult to add anything to the force of the argument. When, however, an occupation is of such a nature that it will be dangerous or deleterious unless brought under the control and supervision of the government, the case falls within the police power; and no one can be prejudiced by the grant of an exclusive privilege, because every one may be debarred.³ Such is the main line of decision as regards the sale of liquor;⁴ and the rule includes every trade or occupation which is calculated to be injurious unless confined to certain persons or localities.⁵ If, for instance, a due regard for health requires that cattle shall be slaughtered at a public abattoir, the State may take the

¹ Adam Smith's *Wealth of Nations*, bk. i. ch. 10.

² 111 U. S. 746, 757.

³ See *Claire v. Davenport*, 13 Iowa, 218; *The Intoxicating Liquor Cases*, 25 Kan. 751.

⁴ *Blair v. Kilpatrick*, 40 Ind. 312; *The State v. Brewers' Liquors*, 25 Conn. 278; *The Metropolitan Board v. Bairie*, 34 N. Y. 657; *Wynehamer v. The People*, 13 Id. 378; *Warren v. The Mayor*, 2 Gray, 98; *Bartemeyer v. Iowa*, 18 Wallace, 729.

⁵ See *Patterson v. Kentucky*, 97 U. S. 501; *State v. Addington*, 77 Mo. 118.

matter into her own hands or intrust it to a body corporate or to an individual clothed with power to do all that is requisite for the attainment of the end.¹ The law was so held in the Slaughter-House Cases,² notwithstanding the strenuous dissent of the minority of the court, who contended that while the legislature might have provided that the entire business should be conducted at a particular locality and under the supervision of officers appointed for the purpose, they could not shut the doors on the public and confine the trade of preparing animals for food to a few favored individuals: if butchers could be so dealt with, so might bakers, gardeners, or shoemakers, and in fact every other trade and calling.

It follows — and the court so held some years afterwards — that as such charters rest on the police power, and cannot be upheld on other grounds, they are not contracts, and may be repealed by virtue of the prerogative which called them into being. Nor do they preclude the incorporation of another company with like powers, contrary to the exclusive terms of the former grant.³

We may believe that the conclusion reached by the majority of the judges in the Slaughter-House Cases was sound, without adopting the reasons by which it was sustained. The statute did not preclude butchers from doing their own slaughtering, and the company was, on the contrary, required, under a heavy penalty, to permit every man to slaughter in their buildings, and to provide ample accommodation for all who were so inclined. Although termed a monopoly by Mr. Justice Miller in delivering the opinion of the court, it did not deserve that name, and might, on the contrary, be regarded as a reasonable police regulation, to which all should conform. Nor can it justly be said, as the same judge seems to have supposed, that the principle of the “great Case of Monopolies” is inapplicable here, because

¹ *Vandine, Petitioner*, 9 Pick. 187; *River Rendering Co. v. Behr*, 7 Mo. App. 345.

² 16 Wallace, 36.

³ *The Butchers' Union Co. v. The Crescent City Co.*, 111 U. S. 746. See *ante*, p. 618.

the question arose "in a contest of the Commons against the monarch," and that a State legislature may grant every exclusive privilege which can be conferred by Parliament. If such is the rule, the Fourteenth Amendment was made to little purpose.

It has been decided on like grounds that as markets require supervision and control in order to prevent the sale of unwholesome provisions and for the sake of cleanliness and health,¹ a city may build a public market-house, and provide that meat and vegetables shall not be sold elsewhere; and it followed that a company might be authorized to erect a building with the same exclusive right, at their own cost, and take the tolls as compensation. Here also the grant was not a monopoly, but a restriction of the privilege of market *overt* to a particular locality or building, which the city might furnish directly or through a company chartered for the purpose. No one was shut out, and all were bound by the regulation.²

The principle that a privilege which cannot be shared by all may be granted exclusively to one, applies to such uses of a street or highway as must, from the nature of the case, be co-ordinated in order to avoid injury and loss. There is nothing in the manufacture or delivery of gas, or the supply of water, to render it the subject of an exclusive grant. No one contends for a monopoly that would prevent water from being carted through the streets in barrels and sold to persons who found the supply from the public mains unwholesome or impure, or that would preclude the formation of a company for the preparation and delivery of compressed gas or stored electricity, because the effect might be to lessen the custom of the public gas-works. When, however, it is proposed to lay pipes for the supply of gas or water in a city, the case is widely different, because the

¹ See *Peirce v. Bartram*, Cowper, 269; *Buffalo v. Webster*, 10 Md. 100; *Wartman v. Philadelphia*, 33 Pa. 202; *Bowling Green v. Carson*, 10 Bush, 64.

² See *Le Claire v. Davenport*, 13 Iowa, 210; *New Orleans v. Stafford*, 27 La. Ann. 417.

streets are public property, and the various channels must be so laid as not to interfere with each other and the public sewers, or endanger the houses on either side ; and the legislature may consequently withhold the privilege altogether, or bestow it on a particular company or individual. It has accordingly been decided by the Supreme Court of the United States that such a charter is not only valid, but may confer an exclusive right on the corporators, which will be irrevocable, and preclude another company from using the streets for the same purpose.¹ These decisions would seem to be sound, because the franchise consists in the right to lay pipes in the highway, and not in the purpose for which they are employed ; but the grant of such an exclusive right has, notwithstanding, been treated as invalid in Ohio, Connecticut, and Illinois.²

There is another franchise which cannot be shared by all, and may therefore be conferred exclusively on one, without infringing the principle which forbids a monopoly. Whether a road shall be opened, and through whose land, involves the consideration of what is requisite for the general good, and will be most convenient for individuals ; and must therefore be determined by the State or some duly authorized tribunal. We might consequently infer that the power should remain intact, and be exercised in view of the circumstances, and that it could not be made the subject of a contract which would preclude the legislature from acting as the occasion requires. It is nevertheless established in the United States that the right to lay out and construct a turnpike or railroad between certain points may not only be vested in a natural or artificial person, but that the legislature may enter into an agreement that no other line of the same kind shall be

¹ New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; New Orleans Water Works v. Rivers, Id. 674; Louisville Gas Co. v. Citizens' Gas Co., Id. 683; Memphis v. Water Co., 5 Heisk. 492; State v. Milwaukee Gas Co., 29 Wis. 454.

² Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19; State v. Cincinnati Gas Co., 18 Ohio, 262; City of Chicago v. Rumpff, 45 Ill. 90.

opened within a given distance on either side, which cannot be violated consistently with the constitutional prohibition, and may be enforced by the courts.¹

Such also, and with perhaps more reason, is the established rule with regard to bridges, because they are substitutes for ferries, which may confessedly be granted irrevocably to an individual; and a stipulation in the charter of a bridge that no other shall be erected within a reasonable distance above or below cannot be revoked, except on compensation made, and through the exercise of the right of eminent domain.² This doctrine has been justified on the ground that necessary and beneficial ends, which would be beyond the unaided means of the State, may be attained with the assistance of individuals, who would not risk their funds in such enterprises if the fruits would be snatched from them in the event of success.³

Contracts which are laws for future legislatures and confer irrevocable rights have a pecuniary value, and it is not surprising that the possession of such a power exposed the legislatures of the various States to temptations which, according to common report, were not always overcome. In Pennsylvania and some of the other States a corrective was applied by enacting that any five persons might, on associating themselves for the construction of a railway between certain termini, and complying with a prescribed routine, become a body corporate endowed with all the powers requisite for such an object, including the right to take the property of their fellow-citizens by virtue of the power of eminent domain, build bridges across navigable rivers, and run trains through the streets of towns and cities, with the consent of

¹ *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 654; *The Pontchartrain R. R. Co. v. New Orleans Nav. Co.*, 15 La. Ann. 404; *The Boston & Lowell R. R. Co. v. The Salem & Lowell R. R. Co.*, 2 Gray, 9.

² *The Bridge Proprietors v. The Hoboken Co.*, 1 Wallace, 116; *The Binghamton Bridge*, 3 Id. 51; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 654.

³ See *The Binghamton Bridge*, 3 Wallace, 51; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 663. See *ante*, p. 684.

the municipality. That this was the least of two evils, may readily be conceded; but it does not follow that it should be regarded as a good, because two or more public works directed to the same end may hinder and embarrass each other, rather than benefit the community, and the tolls which would sustain one enterprise on an efficient basis may be inadequate for both.

A business may, however, be so far public and essential to the general welfare that it cannot properly be thrown open to all, and should therefore be conducted by the government directly, or through agencies which it constitutes and can control. Such is confessedly the case as regards the mails; and telegrams are so far within the principle as to be subject to the local police power, whether State or municipal. But they are also instruments of commerce, which, as regards interstate and foreign messages, may be regulated by Congress and are beyond the control of the States; and a State cannot therefore impose a tax on telegrams to or from other States, or provide how they shall be delivered beyond her borders.¹

The right to do whatever is indispensably necessary for the preservation of life, health, order, or morals, reaches its highest point during insurrection or invasion, when it takes the form of martial law, and may temporarily supersede the rules of the common law and even the restraints imposed by the Constitution,² although still resting on the ground of necessity, or of a reasonable and probable cause for believing that the necessity exists, and incapable of being carried further, even by a legislative fiat.³ The suspension of the habeas corpus act is an instance of this kind, and might be valid in an extreme case, though it were not recognized by the Constitution; and other instances may grow out of the stress caused

¹ *Telegraph Co. v. Texas*, 105 U. S. 460; *Pensacola R. R. Co. v. Western Union Telegraph Co.*, 96 Id. 1; *Western Union Telegraph Co. v. Pendleton*, 122 Id. 347. See *ante*, p. 483.

² See *ante*, p. 761; *Taylor v. Nashville R. R. Co.*, 6 Caldwell, 646.

³ *The Mayor v. Lord*, 18 Wend. 826; *Pacific R. R. Co. v. United States*, 120 U. S. 227, 234.

by the presence of a hostile force. During the heat of battle, or the defence or assault of a fortified town, the combatants cannot always pause to consider where their shells and balls may fall, or the injuries which they may inflict on innocent persons who take no part in the strife and are entitled to whatever protection the law can afford. Under these circumstances the sufferers have no more claim to compensation than if the loss were occasioned by a hurricane or an earthquake, and must set it down as due to causes which governments cannot prevent and are not responsible for.¹ When, however, bridges, railways, or buildings are deliberately destroyed to impede the operations of an enemy, or provisions burned to prevent them from falling into his hands, the case would seem to fall within the constitutional provision which forbids the taking of private property for public use without compensation.² Such is the inclination of the Supreme Court in *The Pacific R. R. Co. v. United States*,³ and the view taken by Vattel. The right is, nevertheless, to a great extent without a remedy, unless one is specifically provided by Congress, because the government cannot be sued, and property which has been consumed cannot be regained, as may land which is occupied under the right of eminent domain without payment.

If the clause prohibiting the laws impairing the obligation of contracts applies only to retroactive legislation, that which forbids deprivation without due process guards the future as well as the present and precludes any statute taking away the remedy for injuries to persons not yet born and rights subsequently acquired, or rendering it less effectual by limiting the amount of damages.⁴ As was observed in *The Passenger R. R. Co. v. Boudrou*, "the people have withheld

¹ See *Pacific R. R. Co. v. United States*, 120 U. S. 227, 234; Vattel, *Droit des Gens*, liv. iii., c. 15, sect. 232.

² See *Mitchell v. Harmony*, 13 Howard, 115, 134; *United States v. Russell*, 13 Wallace, 623.

³ 120 U. S. 227, 234-239.

⁴ *Central R. R. Co. v. Cook*, 1 Winst. (N. C.) L. 319; *Passenger R. R. Co. v. Boudrou*, 92 Pa. 475, 481; *Rhines v. Clark*, 51 Id. 96, 101.

power from the legislature to deprive the injured parties of their remedy, or so circumscribe it that a jury can give only a pitiful fraction of the damage sustained. Nothing less than the full amount of the pecuniary loss which a man suffers from an injury to him in his lands, goods, or person, fills the measure secured in the Declaration of Rights." The rule was applied in this instance, although the action was brought for a loss resulting from the negligence of the defendants' servants, and not for any act or default done or committed by themselves.

LECTURE XXXV.

Retroactive Legislation not necessarily unconstitutional. — Technical Defects may be cured legislatively, but not Defects arising from a Failure of Consideration or the Non-fulfilment of a Condition. — Usurious and other Illegal Contracts, Invalid Marriages, and Contracts barred by the Statutes of Limitations within the Principle, which also includes Statutes enlarging the Rules of Evidence. — A vested Right cannot be retroactively divested, or a Moral converted into a Legal Obligation. — Wills and Voluntary Grants cannot be confirmed retroactively. — The Legislature may ratify any Act which they could have authorized. — An Invalid Municipal Tax or Subscription susceptible of Ratification. — An Express Restraint on Alienation cannot be set aside by Legislation, but it may supply a Want of Power to convey. — The Power to do the Act must exist at the Time of Ratification, and it must have been done for or in behalf of the Body or Person by which it is ratified.

It has been shown that a law confirming an invalid contract, and compelling the grantor or contractor to do as he agreed, does not impair the obligation which the Constitution guarantees; and the weight of authority is that such a statute does not work an unconstitutional deprivation even when the effect is to take away property which might otherwise legally have been retained.¹ There are, nevertheless, numerous instances where it is difficult to draw the line between divestiture and confirmation.

A statute imposing a contractual obligation where no contract has been made, by giving a right of suit, is obviously as much a deprivation as if the thing or money were taken directly instead of through a judicial decree; and it may be contended that the case is substantially the same where there is a contract, but no obligation in the sense in which the term is used in the Constitution of the United States.

¹ See *ante*, p. 738.

A promise which fails for a want of consideration, or a promise which is a *nudum pactum* from any other cause, works no change in the relations of the parties. If it is a promise to convey land, the vendor cannot be compelled to give a deed; if to pay money, there is no debt. And so of a contract that is forbidden by the statute, or contrary to the policy of the common law. A law assuming retroactively to render such a promise obligatory, or to compel the promisor to carry it into effect, virtually provides that one party shall render what he does not owe, and that the other may recover that to which he has no valid claim. Such an enactment does not impair the obligation of the contract, either technically or in the common acceptance of the term, but it may obviously work the deprivation which Magna Charta jealously forbids.¹ The logical inference would therefore seem to be that *choses* in action, like things in possession, must be tested by the law as it existed when they arose, and cannot be affected by subsequent legislation. It was accordingly decided in *The New York & Oswego R. R. Co. v. Van Horn*² that where a subscription to a railway by a private person fails at the time in not conforming to the existing law, it cannot be rendered obligatory by a subsequent statute. "Previous to the passage of this act the subscription was wholly invalid, and could not be enforced by either party. If the effect claimed be given to the act, it makes a binding contract between the parties where no contract previously existed, and in effect takes \$200 of the defendant's property and transfers it to the plaintiff, a private corporation. This no act of the legislature could do. It can never take the private property of one individual, without his consent, and give it to another."³ Such an act comes in direct conflict with the constitutional provision that 'no person shall be deprived of life, liberty,

¹ *New York & Oswego R. R. Co. v. Van Horn*, 57 N. Y. 477.

² 57 N. Y. 497.

³ *Matter of Albany Street*, 11 Wend. 148; *Matter of John and Cherry Street*, 19 Id. 659; *Taylor v. Porter*, 4 Hill, 140; *Varick v. Smith*, 5 Paige, 137; *Cochrane v. Van Surley*, 20 Wend. 865; *Embury v. Conner*, 8 N. Y. 511.

or property without due process of law.'” In *Reiser v. The Saving Fund*,¹ a statute, passed in 1859, declared that the true intent of the act of 1850, regulating building associations, was that the premiums bid by their stockholders for loans should not be deemed usurious, and that the borrower should be liable for the amount nominally loaned, with interest at the rate prescribed in the bond. The court had previously determined that no more could be recovered from such a borrower under the pre-existing statute than the sum actually received by him, with interest at the rate of six per cent; and the act of 1859 was held to be unconstitutional, as varying that interpretation, and imposing a liability which it denied.

There is, nevertheless, a manifest distinction between imposing an obligation to which the party concerned never agreed, and carrying that to which he did agree into effect. The obligation of a contract arises from the legislative command that it shall be observed. If the law does not recognize the contract, or does not provide for its fulfilment, there is no obligation in the legal sense of the term, although the parties have exchanged promises and are morally bound.² In cases of this description, all the elements of a contract are present; but the law does not set its seal or pronounce the fiat without which the courts cannot proceed. Such an instance may occur where one agrees orally to convey land, or where the deed of a married woman is defectively acknowledged. Under these circumstances the presumption is that the parties do not intend a vain or useless thing, but that what they do shall be as effectual as the nature of the case will permit. It may therefore plausibly be contended, and has been held in numerous instances, that the legislature may add the sanction which they originally withheld, and that if they see fit to adopt such a course, it does not lie in the mouth of the covenantor to object. If it be said that such a statute operates to divest the title of the vendor and transfer it to the vendee, the proposition cannot be denied;³

¹ 39 Pa. 317.

² See *ante*, pp. 577, 673.

³ See *Grim v. Weissenberg School District*, 57 Pa. 433.

but it is a right which the former has agreed to part with, and the latter to accept. In such cases there is a distinctive element of consent; and they are not, therefore, precedents where no express or implied promise has been made.¹ One who agrees to do a thing, impliedly agrees that he may be compelled to keep his word. Hence the State may, agreeably to this view, enforce a specific performance or compensation in damages by affording an additional remedy, or by giving a remedy where none exists, and as regards past contracts as well as those which are yet to come. It cannot, either retroactively or prospectively, compel a conveyance where there has been no sale; but it may oblige one who has agreed to sell, and received the price, to execute a deed.²

The authorities agree that while the Fifth and Fifteenth Amendments and the corresponding clauses in the Constitutions of the various States do not preclude legislation for the purpose of enforcing antecedent grants or contracts, no one can, consistently with their provisions, be compelled to perform that which he has not promised, or required to surrender what he has not agreed to forego. In other words, the State cannot make a contract for the citizen,³ but may give a legal sanction to the contracts which he has made. So much is clear; and the difficulty is to know what is a contract within the meaning of the rule. Two theories are conceivable, — one, that there is a contract wherever the parties have agreed; the other, that nothing deserves that name which does not give rise to an obligation under the existing law. It will be found on examination that the decisions have fluctuated between these extremes, without definitely crystallizing at either pole.

The earlier and not a few of the recent judgments take the ground that where the defect of the contract is not inherent, but arises from a statutory disability or a failure to comply with a legal form, it may be cured retroactively by the legislature. Such a statute does not, it is said, conflict with the rule that a man shall not be deprived of his property without

¹ *Embury v. Conner*, 3 N. Y. 511.

² See *Dale v. Medcalf*, 9 Pa. 108; *Menges v. Dentler*, 33 Pa. 495.

³ *Hampshire v. Franklin*, 16 Mass. 216.

due process of law, because the parties have given their assent, and the statute merely enforces the agreement. Agreeably to this view, a contract which is void under the existing law may be rendered obligatory by repealing the disabling enactment,¹—at all events where this was passed from motives of public policy, and not for the protection of the party who relies upon it as a defence.

Statutes confirming usurious contracts have been repeatedly upheld on this ground, and the debtor compelled to repay the principal with the interest;² and the rule is not less applicable to contracts contrary to a penal statute which is subsequently repealed.³ In *Lewis v. McIlvain*, notes had been issued for the purpose of being discounted at an unincorporated banking association, and were consequently void under the existing legislation of Ohio, and a statute authorizing a recovery to be had upon them was held valid, as furthering the intention of the parties by the repeal of a prohibition which was imposed with a view to the public good, and the Commonwealth might consequently waive. Such statutes are remedial, and simply remove an obstacle which has been set in the path of justice with a view to some need which is no longer regarded as conducive to the general good.⁴ In *Hess v. Wurtz*, an act passed March 21, 1814, had declared that "all bills or notes in the nature of bank-notes issued by any unlawful or unincorporated bank should be absolutely null and void, and irrecoverable in any court in Pennsylvania." A subsequent act repealed so much of the prior statute as prevented the holders of such note from recovery. The court held that the act of 1814 must be construed in view of its object, which was to regulate the circulation. The legislature did not intend to annul

¹ *Welch v. Wadsworth*, 30 Conn. 149.

² *Ewell v. Daggs*, 108 U. S. 143; *The Savings Bank v. Allen*, 28 Conn. 97; *Welch v. Wadsworth*, 30 Id. 149; *Curtis v. Leavitt*, 17 Barb. 309; 15 N. Y. 9; *Wood v. Kennedy*, 19 Ind. 68.

³ *Lewis v. McIlvain*, 15 Ohio St. 47; *Trustees v. McClery*, 2 Id. 155; *Hess v. Wurtz*, 4 S. & R. 356. See *ante*, p. 742.

⁴ *Hess v. Wurtz*, 4 S. & R. 261; *Savings Bank v. Allen*, 28 Conn. 97; *Curtis v. Leavitt*, 15 N. Y. 151; *Lewis v. McIlvain*, 16 Ohio St. 347, 357.

such instruments except so far as was requisite to prevent them from being used as money and passing from hand to hand. The whole tenor of the enactment showed that the intention was, so far as unincorporated banking companies were concerned, punishment, not protection,—to inflict a penalty for the violation of the statute, and not to release the guilty parties from the payment of their just debts. It did not lie in the mouth of one who, like the defendant, had broken such a law, to object to the repeal of so much of it as shielded him from actions brought to enforce the obligation which he had incurred in issuing the notes.

The preponderance of authority, accordingly, is that a defendant who received or benefited by the consideration of a contract, may be compelled to render the stipulated equivalent by repealing the rule of policy on which he relies as a justification for not fulfilling his agreement. Such is the interpretation of the prohibition of laws impairing the obligation of contracts, and it applies under the view taken by the Supreme Court of the United States of the clause of the Fourteenth Amendment which forbids deprivation without due process of law.¹ Promises made for a usurious consideration are, agreeably to these decisions, merely voidable, even when the legislature have declared them void, and when the prohibition is withdrawn become as obligatory as if it had never been imposed. The repeal of a statute against usury "without a saving clause" cuts off the defence even in actions upon contracts previously made. Such statutes are not "deprivations," nor do they impair the obligation of contracts.²

In *Curtis v. Leavitt*³ the question was as to the effect of a repeal of the usury laws of New York on a contract made while they were still in force. Section 1 of the act of May

¹ *Gross v. The U. S. General Mortgage Co.*, 108 U. S. 477; *Ewell v. Daggs*, Id. 143. See *ante*, p. 740.

² *Curtis v. Leavitt*, 15 N. Y. 9; *Savings Bank v. Allen*, 28 Conn.; *Welch v. Wadsworth*, 30 Id. 149; *Andrews v. Russell*, 7 Blackford, 474; *Wood v. Kennedy*, 19 Ind. 68; *Danville v. Pace*, 25 Gratt. 1; *Parmelee v. Laurence*, 48 Ill. 331; *Woodruff v. Scruggs*, 27 Ark. 26.

³ 15 N. Y. 9.

15, 1837, forbade usurious contracts and declared them void ; and section 5 provided that whenever any bond, bill, note, etc., was taken in violation of the act, the Court of Chancery should order it to be surrendered and cancelled. Section 6 made the taking of usury a misdemeanor punishable by fine and imprisonment. It was subsequently enacted that "no corporation shall interpose the defence of usury in any action." Brown, J., said the effect of this enactment was not to create a debt, as had been alleged by the appellant's counsel, for that proposition assumed that there was no debt,—the very point in dispute. *Prima facie*, at least, a debt arose from the written obligation of the defendant, and there was unquestionably a moral obligation to pay. The statute might well operate retrospectively, because it did not take away any vested right. The defence given by the usury laws was an inchoate right which might, agreeably to the principle laid down in *The People v. Livingston*,¹ be abrogated at any time before it was perfected by judgment. Chief-Justice Savage had there said, in delivering judgment, that it is competent for the legislature to repeal any act upon which a suit has been brought, and if the repeal is absolute, the suit is at an end. For instance, an existing statute prohibits gaming, and allows an action to recover back money won at play. An action is brought and ready for trial. The day before the circuit, the legislature repeals the act. The suit dies because the court has no jurisdiction, and the party has no right to recover the money. Such right did exist, subject to the contingency of obtaining a judgment, and such jurisdiction too existed ; but both have been taken away because the means of enforcing the right no longer exist. So a borrower has no vested interest in the penalty or forfeiture which follows the proof of usury in an action where that defence is interposed. Whatever right he has is contingent upon the fact of the usury being established upon the trial. This the repealing act declares shall not be done. It makes no difference whether the forfeiture is given to the borrower to be recovered in an action, as under the

¹ 6 Wend. 526.

gaming statutes, or whether it is given him by way of defence in an action to enforce the contract. In either case it is the penalty which the law imposes upon the lender which the borrower seeks to appropriate to his own use; and the act under which he hopes to effect this must be subject to the same rules of construction as other penal statutes.

These refined distinctions seem questionable, under the view taken in *Westervelt v. Gregg*.¹ A right to sue for and recover is a vested right, or at all events property which cannot be abrogated without due process of law; and equally so whether the right arose at common law or was conferred by statute. Money lost at play cannot be recovered back without the aid of legislation; but when such an act has been passed, and demands have arisen under it, they cannot be annulled consistently with the constitutional prohibition.

If, as may be inferred from the dicta in *Curtis v. Leavitt*, the repeal of the statutes against gaming would not only preclude the loser from recovering, but entitle the winner to enforce the wager in New York, such a result would not follow in Pennsylvania, where gaming contracts are regarded as invalid on grounds of public policy and morals, aside from legislation, and no case goes to the extent of holding that an immoral contract can be confirmed retroactively.²

I may add that *Curtis v. Leavitt* does not necessarily conflict with *Reiser v. The Savings Fund*, because the usury laws of Pennsylvania, unlike those of New York, do not impose a penalty, and merely provide that the creditor shall

¹ 12 N. Y. 202.

² In *Campbell v. Holt*, 115 U. S. 620, the Supreme Court of the United States carried this line of decision to the extreme of holding that although the removal of the bar of the statute of limitations to a suit brought for the recovery of real or personal property after it has finally attached is a deprivation without due process of law, *Dickerson v. Colgrove*, 100 U. S. 573, 578; *Bicknell v. Comstock*, 113 Id. 149, the rule does not apply to pecuniary obligations, and a debtor who has destroyed his receipts in the belief that the time has passed when he can be called on to prove that the obligation has been discharged, may be sued and a recovery had against him on a demand which may be unjust, and which he had every reason to regard as at an end.

not recover more than the amount which he has really loaned, with six per cent interest ; and hence a statute undertaking to impose a greater liability may well be regarded as a "deprivation" within the meaning of the constitutional guaranty.¹

In the *Savings Bank v. Allen*,² the rule was laid down broadly by the Supreme Court of Connecticut in the following terms: "Where the object and effect of a retroactive statute is to correct an innocent mistake, remedy a mischief, execute the intention of the parties, and promote justice, then, both as a matter of right and of public policy affecting the peace and welfare of the community, the law should be sustained." This principle was laid down in *Goshen v. Stonington*,³ and has been consistently adhered to in Connecticut.⁴

If this language is to be taken literally, — and the legislature may intervene retroactively whenever in their judgment such legislation is requisite to correct mistakes or afford relief against technical and statutory defects in deeds and contracts, — the charter is a broad one, and extends to every instance where intention fails of effect through a want of form. It was accordingly decided in *Goshen v. Stonington*⁵ that a marriage which has been celebrated before a person who is not legally authorized to perform the ceremony, may be rendered valid retroactively by the legislature. It was conceded that the contract as originally made was devoid of legal obligation, and neither bound the parties to live together nor precluded them from contracting another marriage. Hosmer, C.-J., said it might seem to be an extreme exercise of power to make two individuals man and wife who were not so previously, but that this did not transcend the power of the legislature where the parties had given their consent *per verba de præsenti* with intent to solemnize the marriage, and the obstacle arose from a statutory or common-law rule which might be repealed.

¹ See *ante*, p. 707.

² 4 Conn. 224.

³ 28 Conn. 102.

⁴ *Bridgeport v. Hubbell*, 5 Conn. 237; *Mather v. Chapman*, 6 Id. 55; *Beach v. Walker*, Id. 160; *Norton v. Pettibone*, 7 Id. 319; *Booth v. Booth*, Id. 350; *Savings Bank v. Bates*, 8 Id. 505.

⁵ 4 Conn. 224.

In *Goshorn v. Purcell*¹ the question was whether a statutory grant of jurisdiction to correct mistakes and errors in the deeds of married women was valid as to conveyances executed before the statute, and would authorize a decree supplying an omission in the granting clause of such an instrument. The court held that if the deed was inoperative, the defect was merely one of form. The grantor intended to transfer the right of property, and the grantee gave value in the belief that it had passed. The grantor had the capacity to convey the land, and had attempted to do so in the mode prescribed by law, and could not equitably take advantage of her mistake to deprive the grantee of what she had agreed to give and he was entitled to receive. In *Kearney v. Taylor*,² land which had been sold by order of the Orphans' Court under proceedings in partition was conveyed to one whose name did not appear as a purchaser in the report made to the court, but who took in trust for the actual buyers under an agreement to that effect with them. The Supreme Court of New Jersey subsequently held that such conveyances were invalid; and the legislature thereupon enacted that on proof made to the satisfaction of the court or jury before whom any such deed or conveyance was offered in evidence that it had been executed in good faith, the same should be as effectual as "though it had been made to the purchaser or purchasers reported to the court." The question was ultimately brought before the Supreme Court of the United States, which upheld the statute. So it has been held in numerous instances that the legislature may confirm sales made by tax-collectors, sheriffs, administrators, executors, trustees, and other persons acting in pursuance of an authority conferred by law, which, though good in substance, have yet failed through non-compliance with some preliminary or legal form, or even from a want of jurisdiction in the tribunal by which they were decreed.³

¹ 11 Ohio St. 611.

² 15 Howard, 494.

³ *Wilkinson v. Leland*, 2 Peters, 660; *Watkins v. Holman*, 16 Id. 25; *Menges v. Wirtman*, 1 Pa. 218.

On the other hand, it is not less clear, and seems to be now generally conceded, that the want of consent cannot be supplied by a statute. A moral obligation cannot be converted into a legal obligation where there has been no agreement, express, or implied from some act or undertaking of the person whom it is sought to bind, nor can he legislatively be compelled to pay for a benefit which has been conferred against his will, or on the ground that he was morally bound, and ought to have agreed.¹ In *Menges v. Wirtman* land was irregularly taken in execution and sold under a writ issued in an adjoining county. An act of assembly having been passed to confirm the sale, it was held that as the proceeds of the execution went to pay the owner's debts, he was morally bound to compensate the purchaser, and the legislature might enforce the obligation. When, however, a like question arose in *Dale v. Medcalf*,² under a sale made within the county, but after the return day of the writ, Burnside, J., said that "the proceeding was merely void, and that the legislature could not take the property from the person to whom it regularly belonged. By the 'law of the land' was meant the law of the individual case as established on a fair open trial or an opportunity given for such a trial by due process of law." This decision gave the rule in Pennsylvania; and when the doctrine of *Menges v. Wirtman* was again brought under consideration, the court overruled its former decision on the ground that every right must be determined by the rules existing at the time when it arises, and that a retroactive statute is not "the law of the land" or the "due course of law" which the Constitution requires. If, as was conceded, a sale of lands in Northumberland County, under a writ issued in Lycoming County, did not pass the title, a subsequent act of assembly could not remedy the defect.³ It would likewise appear that a grant which has failed for want of form cannot be legislatively confirmed in the absence of a consideration, because under these circumstances the grantee is a mere volunteer, and has no equity to compel

¹ *Menges v. Wirtman*, 1 Pa. 218.

² 9 Pa. 108.

³ *Menges v. Dentler*, 83 Pa. 495. See *ante*, p. 727.

his benefactor to complete what has been left unfinished. The principle was applied in *Greenough v. Greenough*¹ to a devise, and is equally applicable to a voluntary grant. "The distinction," said Gibson, C.-J., "between a purchaser and a volunteer is the only ground left us on which to found a practical limitation of special legislation. If there be any exception, it is where the consideration is natural love and affection; and the question is raised after the grantor's death by a descendant who will be unprovided for if the gift is not carried into effect."²

The better opinion would also seem to be that the legislature cannot intervene retroactively to confirm an executory contract, or, more accurately, that the person who asks for such relief must have performed his part of the agreement. For when nothing has been done on either side, and the contract is so far wanting in form as not to be obligatory, there is no equitable or legal ground for interfering with the ordinary course of law. An act ratifying an oral contract for the sale of land, and empowering the courts to decree a specific performance, would therefore presumably be unconstitutional, as depriving the vendor of his property, contrary to the due course of law. But there would be a material difference if the remedy were confined to cases where the purchase-money had been paid in full; and it might then be regarded as an extension of the principle on which equity enforces such contracts, where the buyer has gone into possession, and the refusal to convey operates as a fraud.

Whatever the rule may be where the contract is invalid, we may believe that where it is not, and the difficulty is one of proof, it may be obviated by legislation. A deed denoting an intention to convey, and founded on a sufficient cause, but which fails through a mistake or a clerical error on the part of the conveyancer, or because it is not properly acknowledged or recorded, may consequently be rendered operative by a subsequent statute, although the grantor is

¹ 11 Pa. 489, 495.

² See 1 Leading Cases in Equity (4 Am ed) 420; *Ellison v. Ellison*, 6 Vesey, 656. See *York v. Patton*, 13 Pa. 278, 285.

a married woman and unable to contract at common law.¹ The acts providing that the deeds of married women shall be valid, notwithstanding any defect in the certificate of the judge or magistrate before whom they were acknowledged, may be referred to this head, because the certificate is no part of the conveyance, and merely operates as evidence that the wife declared, on being examined separately and apart, that she executed the instrument of her own free will and accord, without undue influence or coercion. Gibson, C.-J., said that the act dealt, not with the contract, but with the evidence of it, in which the parties whose interests were affected could have no vested right. An act to change the rule requiring subscribing witnesses to be called, could not be said to affect the right unless such attestation were, as in the case of a will under the statute of frauds, an essential ingredient, without which the instrument would be void. Here the certificate was not an essential part of the acknowledgment, but a formal means of proof; and in substituting a different form the legislature dispensed with no substantial part of the transaction, and simply provided that a certificate reciting that the *feme covert* had appeared before the proper officer and acknowledged the instrument to be her act and deed, should be at least *prima facie* evidence that the acknowledgment had been duly made.

It results from these decisions that a law removing the obstacle which renders an instrument inadmissible in evidence cannot be treated as a deprivation, although the effect is to enable the grantee or covenantee to enforce a claim which would otherwise have failed for want of proof; but the application of the principle is not infrequently embarrassed by the difficulty of distinguishing form from substance, the remedy from the right, the evidence by which the existence of a grant is established, from the grant itself.² That which cannot be proved, for legal purposes at least, does not exist; and a statute authorizing it to be substantiated by new

¹ *Tate v. Stooltzfooss*, 16 S. & R. 35; *Watson v. Mercer*, 8 Peters, 88. See *ante*, p. 741.

² *Moore v. State*, 43 N. J. Law, 205.

and unusual means of proof, may be regarded as conferring a right rather than affording a remedy. A law providing that testimony shall not be excluded on the ground of interest, or permitting the plaintiff and defendant to appear as witnesses, will not be unconstitutional, even when it operates injuriously on one or other of the parties to an antecedent controversy.¹ The same remark may be made with regard to laws enabling parol evidence to be given, although the contract is in writing and under seal,² or rendering the protest of a notary evidence of the facts therein set forth.³ For a like reason it may be enacted retrospectively that the recitals in a deed executed in pursuance of a statutory authority shall be *prima facie* evidence that the requisites of the law were complied with.⁴ And as the right to enlarge implies the right to restrain, existing means of proof may be taken away if other and sufficient means are left.⁵

The right to abridge the period within which suit may be brought on a past demand, is not less clear. The restriction must not operate as a virtual denial of all remedy by not leaving a reasonable interval within which to assert the claim, but may be valid if this principle is observed.⁶ And in *Berry v. Ramsdall* a statute which allowed only thirty days in which to prosecute an existing demand was held unreasonable and void.

While the legislature may admit evidence which was shut out under the pre-existing law, or shift the burden of proof by declaring that evidence of a certain description shall be sufficient *prima facie*,⁷ they cannot render it conclusive, or debar the opposite party from adducing proof in reply; because this would in effect be to extinguish the right under

¹ *Rich v. Flanders*, 39 N. H. 333.

² *Gibbs v. Gale*, 7 Md. 76.

³ *Fales v. Wadsworth*, 23 Me. 553.

⁴ *Hand v. Ballou*, 9 N. Y. 543; *Adams v. Beal*, 9 Iowa, 61; *Wright v. Dunham*, 18 Mich. 414.

⁵ *Hickox v. Tallman*, 38 Barb. 608.

⁶ *Berry v. Ramsdall*, 4 Metcalf (Ky.) 292; *Call v. Hagger*, 8 Mass. 423; *Price v. Hopkins*, 13 Mich. 318.

⁷ See *The Northern Liberties v. St. John's Church*, 18 Pa. 104.

the pretence of regulating the procedure. If such an act does not impair the obligation of the grant or contract, it manifestly precludes the hearing in due course of law which the Constitution of the several States requires, and may be thought not less contrary to the Article which prohibits *ex post facto* legislation.¹ It would also appear that where there is no contract binding one party to convey, and entitling the other to receive, and the right in question is purely statutory, depending on forms which have not been observed, the defect is vital, and beyond the reach of retroactive legislation.

A law giving an additional remedy for an existing right or contract obviously is not a deprivation so long as its operation is confined to the parties, although the effect is to charge the property of the person in default with a lien which could not have been obtained under the pre-existing law without proceeding to judgment.² And as this may be done directly, so it may be done by ratifying a proceeding which has failed through nonconformity to the act under which it was instituted.³ It was accordingly decided in *Bolton v. Johns*⁴ that as the legislature might have authorized a contractor for the erection of a building to file a claim for the amount due, they might ratify the claim which he had already filed as it regarded the owner for whom the work was done and materials furnished, although not against an intervening purchaser; and a like view was taken in *Schenly v. The Commonwealth*⁵ of an act of assembly declaring that a municipal claim which had been filed by the city should be good notwithstanding a failure to record the ordinance under which the work was done, as the law prescribed.

In *Mercer v. Watson*,⁶ Gibson, C.-J., intimated that if a particular mode of attestation was made essential by statute

¹ *Case v. Dean*, 16 Mich. 13; *White v. Flynn*, 23 Ind. 46; *Allen v. Armstrong*, 16 Iowa, 508; *Young v. Beardslee*, 11 Paige, 93. See *County Seat of Linn County*, 15 Kan. 500.

² *School Directors v. Reed*, 2 Pearson, 187; *Supervisors of Sudbury v. Denis*, 96 Pa. 400. See *ante*, Lecture XXXIII.

³ See *Hepburn v. Curtis*, 7 Watts, 300.

⁴ 5 Pa. 145.

⁵ 1 Watts, 330, 357.

⁶ 36 Pa. 29.

to the passage of the right, and not merely evidence that it had passed, as in the case of the attestation of a will under the statute of frauds, the want of it could not be supplied by a subsequent act of assembly. In *Greenough v. Greenough*¹ it was accordingly decided that an act declaring that every last will and testament to which the testator had made his mark or cross should be valid, did not operate retroactively for the support of a devise where the rights of the parties had become fixed by the death of the testator before the law was changed. If the act was to be regarded as a judicial exposition of the pre-existing law, it was unconstitutional, as encroaching on the province of the courts; and viewed as operating to divest the title which had descended to the heirs, it was contrary to the provision that no man shall be deprived of his property except in the due course of law. The same view was taken in *Snyder v. Bull*² and *McCarty v. Hoffman*.³ These cases may be regarded as indicating that where the right depends solely on an invalid instrument, and there is no other ground on which it can be sustained, the defect cannot be cured by subsequent legislation.

A will is a statutory conveyance, and if the legislature cannot correct a formal defect in such an instrument, a deed of gift should follow the same rule. To justify the intervention of the judiciary or of the legislature to reform a written instrument, the complainant should have some right independently of the writing, and the respondent be under an obligation to convey,—which cannot be said of a devisee and the heir, who are both volunteers, and may each fairly insist on the letter of the law. Such also, agreeably to the view taken in *Menges v. Dentler*,⁴ is the relation between a debtor whose property has been taken in execution, and a purchaser at the sheriff's sale.

The principle has accordingly been said in some instances to be analogous to that under which chancery enforces the performance of contracts which have failed through a non-

¹ 11 Pa. 489.

² 23 Pa. 507.

³ 17 Pa. 58.

⁴ See *ante*, p. 727.

compliance with legal forms.¹ And hence, as Marshall, C.-J., intimated in *Fletcher v. Peck*, it is inapplicable to persons who buy on the faith of the existing law; for as such a purchaser is not a party to the contract which it is the object of the statute to confirm, and has not given his consent in any form, there is no ground depriving him of a title which is equitably as well as legally his own.²

In *Green v. Drinker*³ both parties claimed under the same grantors, one through a deed which was defectively acknowledged, and though recorded, did not operate as notice; the other under a mortgage executed subsequently to the deed, but prior to the passage of a statute which purported to cure the defect of the acknowledgment. The court held that the deed was not duly recorded, and was consequently invalid as against the mortgagee, and that as he had given value without notice, there was nothing to bind his conscience or render it incumbent on him to forego the lien which he had acquired. The statute was binding legally as between the original parties, but could not avail against a *bona fide* purchaser.

Although such a statute cannot defeat intervening rights, it may be valid as regards one who buys after it has been enacted. In *Journey v. Gibson*⁴ the question was like that in *Green v. Drinker*, except that the statute which confirmed the plaintiff's mortgage was anterior to the mortgage under which the defendant claimed, and the plaintiff recovered although the defendant had no actual notice of the prior mortgage, and was not aware that the legislature had remedied the defect.

One who buys with notice that the property in question has been sold or encumbered with the view of taking advantage of a technical defect, is not a *bona fide* purchaser, and may be deprived of what he has unjustly acquired, by retro-

¹ *Chestnut v. Shane's Lessee*, 16 Ohio, 509; *Berdard Township v. Stebbins*, 109 U. S. 341, 351.

² See *Southard v. Southard*, 2 Dutcher, 13; *Thompson v. Morgan*, 6 Minn. 292; *Brinton v. Subers*, 12 Iowa, 289; *Greenough v. Greenough*, 11 Pa. 489, 495.

³ 7 W. & S. 440.

⁴ 56 Pa. 57.

actively confirming the prior grant or mortgage; but the rule does not apply to a purchase made with notice of a defective lien arising from the act of the law without the consent of the debtor whose estate is bound.¹

It results from these decisions that the legislature cannot render a deed or mortgage which has not been duly recorded constructive notice to one who has already bought, but that such a statute may bind a subsequent buyer, although he is in fact ignorant that the premises have been conveyed or encumbered, and pays the purchase-money in the belief that he is acquiring a good title.

It was accordingly decided in *Bolton v. Johns* that an invalid mechanics' lien, filed by a contractor, may be confirmed retroactively, so long as the premises are held by the owner who entered into the agreement under which the house was built, but not as regards a third person who buys before the passage of the law. Gibson, C.-J., said that the statute was clearly constitutional as between the builder and the owner, who was personally liable for the amount due. It did not vary the obligation of the contract, and merely supplemented the remedy which the builder might have obtained by proceeding to judgment by giving an immediate and specific lien. But when the defendant gave value for the property while it was still free from any charge that could be enforced agreeably to the existing law, he acquired a right which could not be impaired retroactively by legislation. It was immaterial in this regard whether he was or was not aware of the existence of the defective lien, for even if he had received actual notice, it would simply have informed him of an attempt to create a lien which had failed of effect. The case stood clear of the principle of *Menges v. Wirtman*,² where it was contended that the legislature might add a legal sanction to a moral obligation, for no such obligation rested on the original owner, and certainly none on the purchaser. It was immaterial that the statute purported to be

¹ See 2 Leading Cases in Equity (4th Am. ed.), 90, 96; *Morse v. Letterman*, 13 S. & R. 167; *Bolton v. Johns*, 5 Pa. 145.

² 1 Pa. 218, 223.

declaratory of the pre-existing law, because if the legislature could not charge a purchaser with the vendor's debt by a direct provision to that effect, such a charge could not be imposed indirectly by putting a particular construction on a statute which had received a different interpretation from the courts. It was, as we have seen, held conversely in *Journeay v. Gibson*,¹ that where a conveyance which has not been duly acknowledged or recorded is confirmed by statute, and thus rendered valid as between the parties, one who buys subsequently will be as much bound as if the defect had not existed.

It results from the same principle that the party in whose favor a deed is reformed by a decree or statute, must have given value, or at least must not be a volunteer claiming against one whose equity is equal or superior to his own.² In *Hout v. Hout*,³ a father conveyed to his sons in consideration of natural love and affection. The deed failed for want of a due acknowledgment, and the grantees filed a petition, after their father's death, for relief under a power which had been conferred retroactively on the courts by the Constitution of Ohio. It was held that as the applicants had not given value, and the grantor had other children who were unprovided for, the petition should be refused.

In like manner the legislature cannot take the estate from the heir and confer it on one who claims under a devise which has not been executed as the law requires; for even if it could be known with legal certainty that the alleged will expressed the settled purpose of the testator's mind, there would still be nothing to bind the conscience of the heir or render it incumbent on him to surrender what is legally his own to a claimant whose only title is a gift that has failed of effect.⁴

It is nevertheless well settled that an heir sits in the seat of his ancestor, and will be bound by any deed or contract

¹ 56 Pa. 57.

² See *Menges v. Wirtman*, 1 Pa. 218, 223.

³ 20 Ohio St. 119.

⁴ See *ante*, p. 801; *Greenough v. Greenough*, 11 Pa. 489.

that could have been enforced specifically against him. Hence an invalid conveyance to a *bona fide* purchaser may as well be confirmed by an act of assembly after the death of the grantor as before, and although she was a married woman acting under a statutory power, and the estate has descended to her heirs. Conversely, a statute legitimatizing a child born out of wedlock and declaring him capable of inheriting from his deceased mother, may be valid if she dies subsequently, but not if the estate has already fallen to the lawful heirs, because both the parties to such a controversy are volunteers, and neither can claim the equitable superiority which alone justifies an interference with legal rights.¹

In the case last cited, the Chief-Justice said it had been remarked in *Menges v. Wirtman*² that a party who has received a benefit from a transaction is under a moral obligation to convey, and that the legislature might give it legal force, and that he still thought that the distinction between a purchaser and a volunteer was the only ground on which to found a practical limit to judicial legislation.

In *Atter's Appeal*,³ an aged couple, having no lineal descendants, determined to make their wills in favor of each other, so that the survivor should have all that either of them possessed. The wills were drawn alike, *mutatis mutandis*, and laid on the table for execution, but each testator inadvertently signed the paper intended for the other. The husband died, and the legislature sought to correct the mistake by authorizing the Register's Court to receive evidence, and if the facts were proved, proceed to reform his will. The widow filed a petition for relief under the law, and the mistake was clearly shown; but the court held the enactment unconstitutional, and the decision was affirmed by the court above.

It might at first sight appear that the appellant in this case was not a volunteer, but a party to an agreement which had failed through one of those accidents which a court of

¹ See *Norman v. Heist*, 5 W. & S. 171; *Greenough v. Greenough*, 11 Pa. 489, 495.

² 1 Pa. 218.

³ 67 Pa. 341.

equity is competent to redress. Such might well have been the result if there had been a part performance on which to found a decree. But inasmuch as the appellant's will was as invalid as her husband's, and he could not have taken anything which it purported to confer, the case was simply that of a parol agreement which had not been carried into effect on either side.

Retrospective legislation may also be upheld on the ground that ratification is equivalent for most purposes, to a command. It has been held to follow from this principle that when an act done irregularly or without authority is one that the legislature might have authorized, it may be rendered valid by a subsequent statute.¹ Contracts made and bonds issued *ultra vires* by municipal corporations have frequently been confirmed on this ground,² which has also been applied to cure defects in the organization of bodies corporate, or in the elections held by them for the choice of directors, presidents, cashiers, or other officers.³

It has also been held that as a State may subject property to taxation for any cause, past or present,⁴ it may declare retrospectively that a statute imposing a collateral inheritance tax shall be so construed as to embrace the estates of persons who have died during the interval, if the effects are still undistributed in the hands of trustees or executors who reside in the State and are subject to its jurisdiction;⁵ or, as the principle was stated in *Hewitt's Appeal*,⁶ if the legislature might have authorized the tax,

¹ *Green v. The Weissenberg School District*, 57 Pa. 433, 438; *The U. S. Mortgage Co. v. Gross*, 93 Ill. 483; *Anderson v. Santa Anna*, 116 U. S. 856, 364.

² *Mutual Benefit Ins. Co. v. Elizabeth*, 42 N. J. Law, 235, 244; *Jonesboro v. The Cairo R. R. Co.*, 110 U. S. 192; *Katzenberg v. Aberdeen*, 121 Id. 172.

³ *Jonesboro v. The Cairo R. R. Co.*, 110 U. S. 192; *Baxter v. Toledo*, 5 Ohio St. 225.

⁴ *Schively v. The Commonwealth*, 36 Pa. 29; *Green v. The School District*, 57 Id. 433.

⁵ *In re Short's Estate*, 16 Pa. 63; 17 Howard, 456.

⁶ 88 Pa. 55.

they may by a retroactive law remedy any irregularity or want of power in the persons levying it. So a municipal tax which exceeds the authority of the town or borough by which it is imposed may be ratified by the State so long as it remains uncollected.¹ And where a county or other municipal corporation is authorized to take stock in a railroad and raise the money by taxation on certain conditions which are not fulfilled, the defect may be cured retroactively by the legislature.² It was accordingly held in *Green v. The School District* that where a school board had levied a tax which was not authorized by law, the legislature might cure the defect retroactively, although the effect was not only to defeat an action which had been brought against the board but to render the plaintiff liable in costs. The court said that there was no right to costs that could not be divested by the legislature. All costs, both in England and Pennsylvania, depended on the statutes, and would fail with their repeal. A judgment for costs was not within this principle, but had a new and independent life, which the legislature could not destroy without an exercise of the judicial function to which it was incompetent.³

It has been decided in numerous instances that a municipal subscription to a railway or other public enterprise, which fails for want of power, or a defective execution of the power actually possessed, may be confirmed by a subsequent enactment if the circumstances are such that the legislature could do or command that which it ratifies.⁴ In *Cutter v. The Board of Supervisors*, the statute under which the subscription took place authorized bonds with interest payable annu-

¹ *Cowgill v. Long*, 15 Ill. 202; *Keithsburgh v. Frick*, 34 Id. 405; *Anderson v. Santa Anna*, 116 U. S. 356, 360; *Schofield v. Watkins*, 22 Ill. 66; *Green v. The School District*, 57 Pa. 433.

² *Thompson v. Lee County*, 3 Wallace, 327; *The People v. Mitchell*, 35 N. Y. 551; *Grenada County v. Brogden*, 112 U. S. 261; *Anderson v. Santa Anna*, 116 Id. 365; *St. Joseph Township v. Rogers*, 16 Wallace, 644.

³ See *ante*, p. 495.

⁴ *Grenada County v. Brogden*, 112 U. S. 261; *Ritchie v. Franklin*, 22 Wallace, 67; *Cutter v. The Board of Supervisors*, 56 Miss. 115.

ally, while the proposal submitted to the people and adopted by them was for bonds with interest semi-annually; and the court held that the defect might be cured retroactively. Such a ratification was not an attempt to impose a debt on the county without its consent. The people had, on the contrary, voted to incur the debt in the shape of the bonds under consideration; and the legislature simply intervened to carry out their intent by correcting the irregularity which prevented it from taking effect.

It is, notwithstanding, established that ratification must take place at a time and under circumstances when the ratifying party could have done the act which he confirms;¹ and a ratification of an unauthorized stoppage *in transitu* comes too late after the goods have been delivered to the consignee. If a constitutional amendment precludes the legislature from authorizing a municipal subscription, they can no longer ratify one made prior to the amendment, and when such an authority might well have been conferred.² In *Sykes v. The Mayor of Columbus* the Constitution of 1869 prohibited the issue of municipal bonds except on certain conditions, and it was held that bonds which had been issued previously, but did not meet this requirement, were thereby rendered insusceptible of ratification. They might have been authorized or confirmed under the former Constitution, but the power needful for either end was gone.³

It is not less well settled that to render a ratification valid the act must have been done or contract made for or on behalf of the person or body by whom it is confirmed,—which cannot be said when the legislature attempts to give life to agreements between individuals which were not valid under the pre-existing law. The contracts of municipal corporations and other public agents stand on a different footing, because the government might have done directly what was effected through an intermediate hand, and it may consequently be

¹ *Bird v. Brown*, 4 Ex. 786, 798; *Grenada County v. Brogden*, 112 U. S. 261, 271; *Hare on Contracts*, 280.

² *Sykes v. The Mayor of Columbus*, 55 Miss. 115.

³ See *Grenada County v. Brogden*, 112 U. S. 261, 271.

ratified by the State.¹ Two cases in the same volume of reports, which might seem opposite, may be reconciled with the aid of this distinction.² In *The Oswego R. R. Co. v. Van Horn*, a New York statute required that ten per cent of the amount of subscriptions to railroad stock should be paid in advance. The defendant did not pay the ten per cent, and the court held that the defect could not be remedied retroactively, because he was acting on his own behalf and could not be compelled to render what he did not owe.

In *Duanesburgh v. Jenkins*³ the question arose under a statute authorizing municipal subscriptions to railroads on conditions which, in the instance under consideration, had not been fulfilled; but the bonds were, notwithstanding, executed, and came to the plaintiff's hands. The act was a public one on the part of an agency constituted by the State; and a subsequent statute providing that where bonds had been issued by the commissioner of a town to aid in the construction of a railroad, and the railroad built, the bonds should be valid without reference to the sufficiency of the proofs, was held good, because the legislature might have authorized the subscription unconditionally in the first instance.

While the legislature may retroactively cure a disability imposed by the law, it cannot so deal with a restriction imposed by a grantor or testator. If it could not have enabled the vendor to convey, it cannot confirm the title of the purchaser. In *Jones's Appeal*,⁴ a husband and wife who had sold land and executed a deed, sought to set it aside on the ground that as the premises were for her separate use, she had no power to convey; and it was held that the legislature might well authorize the court of Common Pleas to confirm the sale on proof of the above facts and that she had received the purchase-money.

¹ See *Ritchie v. Franklin*, 22 Wallace, 167; *Grenada County v. Brogden*, 112 U. S. 261, 271; *Anderson v. Santa Anna*, 116 Id. 364; *Sykes v. The Mayor of Columbus*, 55 Miss. 115.

² See *Duanesburgh v. Jenkins*, 57 N. Y. 77; *The Oswego R. R. Co. v. Van Horn*, Id. 473.

³ 57 N. Y. 177.

⁴ 57 Pa. 369.

A like question arose not long afterwards in *Shonk v. Brown*,¹ but with an opposite result. Land was devised to the separate use of a married woman, with a condition against alienation. She died after having conveyed it to a purchaser, and an act passed to confirm his title was held to be inoperative against her heirs. Agreeably to the view taken by the court, the legislature may relieve a married woman from the restraint implied in a grant to her separate use, but has no such power when the disability is imposed in terms by the grant or devise under which she claims. Such a distinction is questionable, because the validity of a condition against alienation depends on the law, and may consequently, where there is no gift over, be abrogated by a statute empowering the grantee to convey, or ratifying a deed which is already executed. Moreover, the grantor must be presumed to know and intend the legal consequences of what he does; and if these are that the property shall be inalienable, a statute authorizing a conveyance frustrates his purpose as well as the pre-existing rule of law.

The doctrine that a ratification is equivalent to a command may be altogether just when the party ratifying is the party to be bound and cannot well object to a burden which he has voluntarily assumed; but the case is widely different where the sovereign endeavors to render a past act or contract binding on an individual. The legislature may authorize the sheriff to proceed to a condemnation and sale of land beyond his bailiwick; but such a transfer cannot justly be confirmed by a subsequent statute, because purchasers may have refrained from bidding, under the belief that they would not acquire a valid title, or the defendant in the execution may have thought himself secure and omitted the steps necessary to protect his interest.² Nor can it safely be assumed that the confirmation of a contract of a body corporate, which was *ultra vires* under the pre-existing law, is identical in point of right and justice with a statute authorizing such a contract to be made. Had the corporation been known to possess such a power, more care might have been

¹ 61 Pa. 320.

² See *ante*, p. 727.

taken in the election of its officers, or they might have been chosen under a pledge not to exercise the power. Accordingly, in *Hasbrouck v. Milwaukee*,¹ where the city of Milwaukee, which had been authorized by act of assembly to contract for the construction of a harbor at an expense not exceeding \$100,000, entered into a contract stipulating for the payment of a larger sum, the court held that the contract could not be ratified by the legislature. A void contract was said to be in effect none, and the attempt to render it binding, the creation of a right rather than a grant of a remedy. This decision would seem to be better founded than the cases of *Guilford v. Supervisors of Chenango*,² and *Brewster v. Syracuse*,³ where a similar question was decided the other way. It was held in like manner by the Supreme Court of Pennsylvania, in *Dale v. Medcalf*,⁴ that a sale made by the sheriff subsequently to the return day could not be rendered valid retrospectively as against a purchaser at a subsequent sale under an incumbrance which would have been discharged if the former sale had passed the title. For the same reason, a statutory ratification of a sheriff's sale of land situated in another county will be unconstitutional as regards the defendant in the execution, and those claiming under him by descent or purchase, although the proceeds have gone to pay his debts and he may be regarded as under a moral obligation to convey.⁵

The inclination of the judicial mind is against retroactive legislation, as open to abuse and tending to disturb titles which were valid under the pre-existing rule; and a statute will not be allowed to operate on antecedent rights or remedies if it admits of a different construction, nor unless the intention of the legislature is clear and unequivocal.⁶

¹ 13 Wis. 37.

² 19 N. Y. 116.

³ 18 Barbour, 165; 13 N. Y. 143.

⁴ 9 Pa. 108.

⁵ *Menges v. Dentler*, 33 Pa. 495. See *ante*, p. 727.

⁶ *Robb v. Harland*, 7 Pa. 292; *Bedford v. Shilling*, 4 S. & R. 408; *Dewart v. Purdy*, 29 Pa. 113; *Murray v. Gibson*, 15 Howard, 421, 423; *McEwen v. Bulkley*, 24 Id. 242, 244; *Twenty Per Cent Cases*, 20 Wallace, 179, 187; *Cook v. Googins*, 136 Mass. 410.

"Courts of justice agree that no statute, however positive in its terms,

is to be construed as designed to interfere with existing contracts or rights of actions, or with vested rights, unless the intention that it shall so operate is expressly declared or is to be necessarily implied; and pursuant to that rule courts will apply new statutes only to future cases, unless there is something in the nature of the case or in the language of the new provision which shows that they were intended to have a retroactive operation. Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms. *Twenty per Cent Cases*, 20 Wallace, 810; *Potter's Dwaris*, 161; *Wood v. Oakley*, 11 Paige, 403; *Butler v. Palmer*, 1 Hill, 325; *Jarvis*, 3 Edwards, 446; *McEwen v. Bulkley*, 21 Howard, 242; *Harvey v. Tyler*, 2 Wallace, 329; *Blanchard v. Sprague*, 3 Sumner, 535; *United States v. Heth*, 3 Cranch, 399."

LECTURE XXXVI.

Land which cannot be divided without Injury may be sold for the Purpose of Partition. — The Conversion of Property into Money is not necessarily Deprivation. — Unproductive Property may be sold, and the Proceeds invested for the Support of an Owner who is insane or under Age, although the other Owners do not concur. — Conversion at the Instance of a Life-tenant when the Remainder-men are not *sui juris* or cannot be ascertained. — Such a Conversion unconstitutional where all the Parties are *sui juris*. — Land cannot be converted into Money without the Consent of a Remainder-man who is under no Disability. — The Legislature cannot authorize the Conversion of Land where no Legal Necessity exists. — Legislative Action for such Purposes forbidden in some of the States. — The Power should be exercised through the Courts.

THERE is an exceptional class of cases which will be found on examination to be consistent with Magna Charta, although at first sight they may appear to be at variance with it and the general principles of jurisprudence. It is well settled in Pennsylvania and generally throughout the United States, contrary to the practice at common law and of the English Chancery, that where land held by joint tenants or tenants in common cannot be divided without spoiling the whole, and no one of them will take it at a valuation, the legislature may authorize or the court direct a sale at the instance of one or more of the persons interested, although the rest dissent, because the right to a partition is an incident of property to which every joint owner is at once subject and entitled.¹ Such a proceeding must nevertheless be duly instituted with notice to all concerned, and an act of assembly authorizing a sale of the real estate of a decedent, on the application of his executors without summoning his heirs or obtaining their

¹ 2 Leading Cases in Equity (11th Am. ed.), 915; *Kneass's Appeal*, 31 Pa. 87, 90; *Richardson v. Morrison*, 23 Conn. 94.

assent, is simply void.¹ The principle on which these decisions proceed is, that one joint owner is not entitled to stand in the way of the others, or prevent a partition that will be beneficial to them without being injurious to himself. All have an equal right; and if they cannot agree, the court may put an end to the controversy by giving each his share, and decree a sale if there is no other way.² Such a taking is not deprivation in the constitutional sense of the term, because the land is sold at the instance of one who is jointly interested and the proceeds are divided among all.³ It is essential that the parties in interest should have notice or appear,⁴ although publication may be substituted for actual notice as regards those who are unknown or beyond the reach of process.⁵

The power is ordinarily administered judicially; but where there was a clear right to a partition among tenants in common, but the proceedings might be indefinitely delayed by a contest with regard to the last will of one of them, the court held that the legislature might cut the knot by ordering a sale and distribution of the proceeds;⁶ and the decision seems to have been approved in *Hegarty's Appeal*.⁷

It has been held to follow from the same principle that where land belonging to several persons cannot be drained or secured from inundation without a systematic plan, the legislature may, at the instance of one or more of the owners, direct the construction of the necessary dikes or ditches, and that the cost shall be assessed on all, although some of them withhold their assent.⁸ This, however, is a stretch of power that can be defended only on the ground taken in some instances of a custom which is inveterate and has the force of

¹ *Kneass's Appeal*, 31 Pa. 87.

² *Head v. The Amoskeag Co.*, 113 U. S. 9, 22.

³ See *Kneass's Appeal*, 31 Pa. 87.

⁴ *Mead v. Mitchell*, 17 N. Y. 210; *Richard v. Rote*, 68 Pa. 248.

⁵ See *Mead v. Mitchell*, 17 N. Y. 210.

⁶ *Biddle v. Starr*, 9 Pa. 461.

⁷ 75 Pa. 504, 518.

⁸ *Wurtz v. Hoagland*, 114 U. S. 606. See *Head v. The Amoskeag Co.*, 113 Id. 9, 22.

law.¹ The legislature may also constitutionally enact that land or property of any kind belonging to persons who by reason of infancy, lunacy, or other cause are unable to convey, and which is unproductive or does not yield an adequate return, may be sold at the instance of the guardian, committee, or trustee, and the proceeds used for pressing needs. Such an exercise of authority is not despotic, but paternal, to provide for the education or maintenance of persons whose condition is such that they cannot care for themselves, and may be regarded as the wards of the State.²

It has been held on like grounds that when property has been settled by will or deed for life, with limitations over to persons not in being or who are incompetent to exercise a legal judgment, the legislature may authorize a sale and the re-investment of the proceeds for the same uses, if such a course will be for the benefit of all concerned, or beneficial to some of them, and not injurious to the rest.³ This power cannot ordinarily be exercised without the consent of all who are *sui juris*; but where one or more of the parties is an infant or lunatic, the land may be sold to provide for his wants if there are no other means, against the will of the other life-tenants or remainder-men.⁴ So unproductive real estate may be sold with leave of the court or under an act of assembly by the committee or guardian of a tenant for life who is insane or under age, notwithstanding the opposition of the remainder-men, on the principle which prevails in partition, that land belonging to several owners who cannot agree may be converted into money if there is no other

¹ See *ante*, pp. 290, 314; also *Coster v. The Tide Water Co.*, 3 C. E. Green, 514, 518.

² *Cochran v. Van Surlay*, 20 Wend. 365; *Liggett v. Hunter*, 19 N. Y. 445; *Brevoort v. Grace*, 53 Id. 245; *Davison v. Johonnot*, 7 Met. 388; *Rice v. Parkman*, 16 Mass. 326.

³ *Ester v. Hutchman*, 14 S. & R. 435; *Norris v. Clymer*, 2 Pa. 285; *Rice v. Parkman*, 16 Mass. 326; *Blagge v. Miles*, 1 Story, 426; *Sohier v. The Massachusetts General Hospital*, 3 Cushing, 483; *Brevoort v. Grace*, 53 N. Y. 245, 259; *Linsley v. Hubbard*, 44 Conn. 109.

⁴ *Sohier v. The Massachusetts General Hospital*, 3 Cushing, 483, 493.

way of giving each his share.¹ Such a sale simply turns the property into another form, where it may bear fruit for the first takers, who would otherwise have a barren inheritance and be postponed, as regards all real and substantial benefit, to persons yet unborn. It cannot, however, be appropriately exercised unless the proceeds can be placed in trust and held securely for the executory devisees or remainder-men. The purchase-money must consequently be invested for the use of the parties or paid to a trustee who acts as their representative, and no part of it can be laid out in improvements on other land devised for the same uses, advantageous as such an expenditure may appear to be to the *cestuis que trustent*.²

It has also been said that when an estate is vested in trustees for purposes which require that they shall represent and act for the *cestuis que trustent*, and the latter are so uncertain or numerous that they cannot join in the petition or be summoned to appear, or have limited interests, or are under legal disabilities, the legislature may authorize the trustees to sell with their assent, "because no legal right is violated, and the conversion is made by the legal owner or with his concurrence."³ It is nevertheless difficult to believe that where consent would be requisite if the property were not in trust, it may be dispensed with simply on that ground, because one who is beneficially interested in land or goods is as much an owner and entitled to be heard as if he held the legal title; and the import of the decisions seems to be, not that the legislature may authorize a trustee to sell without the consent of his *cestuis que trustent* when the circumstances do not imperatively require the change, but that when such a necessity exists, the power may be conferred on one who represents all, and will presumably exercise it for the general good.⁴

¹ See *Brevoort v. Grace*, 53 N. Y. 245, 253; *Mead v. Mitchell*, 17 Id. 210; *Linsley v. Hubbard*, 44 Conn. 109.

² *Martin's Appeal*, 23 Pa. 433; *Solier v. The Massachusetts General Hospital*, 3 Cushing, 483, 493.

³ *Ker v. Kitchen*, 17 Pa. 438; *Kneass's Appeal*, 31 Id. 87, 90; *Hegarty's Appeal*, 75 Id. 503, 517.

⁴ *Palairer's Appeal*, 67 Pa. 473; *Ervine's Appeal*, 16 Id. 264.

The cases above considered are exceptions to the general and obvious rule that every one may insist that his property shall remain intact until he desires a change, and shall not be taken from him and turned into money on the ground that he or other parties interested will be benefited by the conversion.¹ No legislative body in this country has the omnipotence of Parliament, or can make grants or contracts for individuals who are able to think and act for themselves. If absolute power resides anywhere, it is in the people, and must be exercised by them in subordination to the *lex legum* or organic law by which they are severally and collectively bound. Property cannot be taken for private ends, for if it could, there would be no right to the compensation which must come from the funds contributed by all, and is only due where some public interest will be served.² It was accordingly said in *Ervine's Appeal*³ that in no instance "where the legislature ordered the sale of one man's land when he was *sui juris* and under no disability, for the benefit of another person also *sui juris*, was the decree sustained;" and this dictum was cited and approved in *Kneass's Appeal*.⁴ "The power to authorize the conversion of land," said Sharswood, J., in *Palairret's Appeal*, "has never been recognized as constitutional by this court except in the case of the property of persons under disabilities, or where there were contingent interests whose owners had not come into existence, and that, too, with the consent of those standing in the fiduciary relation of trustee, guardian, or committee. The cases in which such conversion may be authorized seem well enumerated in Mr. Price's valuable act of April 18, 1853.⁵ But it has been expressly repudiated and denied in the case of owners *sui juris* not consenting nor presumed from acquiescence to have consented. . . . In *Kneass's Appeal*,⁶ it was expressly held that the legislature had no

¹ *Palairret's Appeal*, 67 Pa. 493; *Hegarty's Appeal*, 75 Id. 503.

² *Powers v. Bergen*, 6 N. Y. 358; *Brevoort v. Grace*, 53 Id. 245; *Palairret's Appeal*, 67 Pa. 493; *Comstock v. Gay*, 51 Conn. 45, 62.

³ 16 Pa. 264.

⁴ 31 Pa. 87.

⁵ Pamph. L. 503.

⁶ 31 Pa. 87.

power to authorize the sale of the property of parties *sui juris* and seized of a vested estate in the premises against their consent. 'Where it is judicially established,' said Chief-Justice Lewis, 'that the estates of tenants in common cannot be divided without prejudice or spoiling the whole, and where no one of the parties will take the property at the valuation, the power to sell is exercised by the courts, and this power is derived from the legislature. But it is justified by the necessities of justice; the parties in interest cannot otherwise enjoy their rights; and a sale in such a case is as valid as a judicial sale for payment of debts.'"¹ Accordingly, where land was bequeathed to executors in trust to support the testator's son out of the rents, issues, and profits, with a proviso that none of it should be sold until his death, and the whole then distributed among his children, an act requiring the orphans' court to appoint a trustee to sell and invest the proceeds for the uses of the will was held unconstitutional by the court below, which refused to exercise the power without the consent of the remainder-men, and the judgment was sustained by the court of last resort.² The same point may be found in *Shoenberger v. The School Directors*;³ and it follows that land cannot be converted into money at the instance of a tenant for life against the will of an executory devisee or a remainder-man who is in being and not disabled from judging for himself, nor on the application of a remainder-man contrary to the wish of the first taker, unless the disability of one or more of the parties, or, agreeably to the Pennsylvania decisions, the unproductive nature of the property, creates an exception to the rule.⁴

Agreeably to the view taken in *Brevoort v. Grace*,⁵ while the legislature may specifically authorize the sale of land

¹ See also *Powers v. Bergen*, 6 N. Y. 358.

² *Ervine's Appeal*, 16 Pa. 256.

³ 32 Pa. 34.

⁴ *Powers v. Bergen*, 6 N. Y. 358; *Brevoort v. Grace*, 53 Id. 245; *Shoenberger v. The School District*, 32 Pa. 31; *Ervine's Appeal*, 16 Id. 264; *Kneass's Appeal*, 31 Id. 87; *Hegarty's Appeal*, 75 Id. 503, 507.

⁵ 53 N. Y. 245.

belonging to infants or other persons not capable of acting for themselves, and also the contingent rights of persons not *in esse*, it has no such power relatively to persons of full age and under no disability, and cannot direct the conversion of their interest into money, whether it be "a vested estate in expectancy, or a contingent estate in expectancy." A tenant in fee no more represents the person to whom the estate is devised over in the event of his dying childless, than he represents a vested remainder-man. An enactment that the property shall be sold at his instance without summoning the executory devisee and obtaining his consent, operates as a deprivation without due process of law; and as there is under these circumstances an entire want of power, it is immaterial that the sale will be beneficial to all the parties concerned. "It is insisted," said Grover, J., "that the act in question should be sustained for the reason that some of the heirs are infants, and that the legislature has the power to authorize the sale of the interests of these infants. But this does not confer the power to authorize a sale of the interests of the adults without their consent. It is further insisted that although the legislature may not have the power to authorize the sale of an estate in possession or a vested estate in expectancy of an adult without his consent, yet it can authorize the sale of a contingent estate in expectancy. I can see no reason for the distinction. An owner *sui juris* is equally competent to determine and manage for himself in the one case as in the other. The foundation of the power of the legislature to act in behalf of any owner is the want of capacity to act for himself; and this reason no more extends to the case of a contingent than to a vested expectant estate."

The difference between this opinion and that which prevails in Massachusetts and Pennsylvania, is that, agreeably to the view taken in the latter States, land may be sold at the instance or on behalf of persons who are not *sui juris*, although other persons who are *sui juris* and are also interested do not concur in the application. A joint owner or remainder-man, whether his interest be vested or contingent, who is in being and competent to decide for him-

self, will not be compelled in New York to part with his property by a court or legislatively, because another owner or the tenant for life is under age or insane and stands in need of such order or decree. This conclusion would seem to be entirely just, unless the respective estates or interests are so inextricably involved that they cannot be disentangled in the ordinary course of proceedings in partition, when a sale may be decreed by a court of equity as the only means of giving each his share.

If land is devised one half to A absolutely, and the other half to B for life, remainder in fee to his minor children with an executory devise over to A, and the latter opposes a sale which B desires for the education and maintenance of the infants, the court may put an end to the controversy by directing the master to sell and distribute the proceeds, or, if the property can be divided without prejudice, set the respective shares off in severalty; B's interest will then be distinct from A's, and the title of the executory devisee will not, agreeably to the view taken in Pennsylvania, be allowed to stand in the way of the conversion which is necessary for the children, although he is *sui juris* and does not consent, the reason being that the right to distribution is paramount, and may be carried into effect through a sale if there is no other way.¹

It is at the same time generally conceded that the legislature cannot, by assuming the necessity which can alone justify the exercise of such a power, take the estate of one man and transfer it to another, even through the instrumentality of a sale to the highest bidder, on the plea that the effect is simply to convert the property into money, which will be invested and bear interest for all concerned.² The statute should consequently recite the facts which warrant the conversion; and whether it does so or not, the case may be reviewed by the courts, and the sale set aside if there is

¹ See *Smith v. Townsend*, 32 Pa. 434, 442; *Greenawalt's Appeal*, 37 Id. 95, 100.

² *Powers v. Bergen*, 6 N. Y. 358; *Lane v. Dorman*, 3 Scammon, 242. See opinions of the judges, 4 N. H. 572.

no sufficient ground.¹ The existence of liens for taxes or other incumbrances will not, therefore, warrant the sale of an entire estate consisting of several parcels, if it appears that one of them might and did yield enough to discharge the debts.² The power to direct a sale for the payment of debts or on the ground that such a conversion is necessary or beneficial to persons who from infancy or other causes are unable to act for themselves, depends on facts which should be judicially ascertained in due course of law, and not left to a body which may lay down rules but cannot properly determine whether the circumstances require their application,³ but is viewed in Massachusetts as ministerial, because there is no controversy between party and party, nor is any question of ownership involved.⁴

The problem has been simplified in some of the States by a constitutional prohibition of private or special legislation and laws conferring the requisite powers on the courts;⁵ but the question remains, Can a contingent interest be so disposed of without the owner's consent, although all the parties are *sui juris* and there are no debts? and was answered affirmatively in Pennsylvania.⁶

¹ Powers v. Bergen, 6 N. Y. 358.

² Brevoort v. Grace, 53 N. Y. 245.

³ See *post*, p. 846; also opinions of the judges, 4 N. H. 572; and Powers v. Bergen, 6 N. Y. 538; Brevoort v. Grace, 50 N. Y. 245; Kneass's Appeal, 31 Pa. 87; Ervine's Appeal, 16 Id. 265; Palairot's Appeal, 67 Id. 493; Hegarty's Appeal, 75 Id. 503.

⁴ Rice v. Parkman, 16 Mass. 326; Blagge v. Miles, 1 Story, 426, 444; Davison v. Johannot, 7 Met. 388; Sohler v. The Massachusetts General Hospital, 3 Cushing, 483.

⁵ Burton's Appeal, 57 Pa. 213.

⁶ Greenawalt's Appeal, 37 Pa. 95.

LECTURE XXXVII.

What constitutes Property in the Sense of the Fifth and Fourteenth Amendments. — Taking away the Remedy is a Deprivation of the Right. — Choses in Action are as much Property as Things actually possessed. — That which Another may Dispose of absolutely, or convert to his own Use, is not mine. — The Survivorship of a Joint Tenant, and a Remainder after an Estate Tail are within this Principle. — Dower and Tenancy by the Curtesy. — A Man's Papers are Property. — Unreasonable Searches and Seizures. — A Man cannot be compelled in a Criminal or Penal Proceeding to become a Witness against Himself, or to produce his Books and Papers. — Repealing the Statute of Limitations will not revive a Right which it has barred. — Application of this Principle in Criminal Proceedings and to Debts. — A Man may have a Right of Property in a Defence.

THE term "property" as used in the constitutional prohibition includes every right to the use, possession, enjoyment, or recovery of land, goods, or money which the law will vindicate if assailed, or that can be enforced as a defence or cause of action.¹ As the obligation of a contract may be impaired by abrogating the remedy, so a like result will follow in the case of property; and if the action of ejectment were repealed, and no effectual means of redress given in its place, the legislature would become the accomplice of every intruder on another's land, and the owner be as much deprived by the State as if her officers had entered and turned him out. So every citizen has an inherent right to the use of the navigable streams and highways, which partakes of the nature of property, and may treat an act of assembly by which an inefficient remedy is substituted for that provided by the common law as a deprivation without due process.² Conversely, he who, by taking away my means of answering or satisfying a demand, obliges

¹ *Rhines v. Clark*, 51 Pa. 96; *Barclay R. R. Co. v. Ingham*, 36 Id. 201.

² *Rhines v. Clark*, 51 Pa. 96.

me to render what I do not owe, deprives me as effectually as if he wrested something that is my own directly from my grasp; and so when I am precluded from recovering what is due to me. Choses in action are consequently as much property as choses in possession; the one being a vested right to obtain the thing with the certainty of obtaining it by resorting to the requisite proceedings unless there is good defence, and the other a vested right to the thing after it has been obtained.¹

The State legislatures are expressly forbidden to impair the obligation of contracts; but if this prohibition were repealed, an implied prohibition would still result from the clause forbidding deprivation. The right need not be immediate, and may depend on a remote event that may never occur; but the thing to which it relates must not be so far another's that he can, by disposing of it or converting it to his own use, defeat the right. A bequest over to B of so much of a bequest to A as the latter does not use, will not confer a right of property on B, because the entire right is, in the contemplation of law, in the first taker. An heir may be said to have a right to the estate of his ancestor; but it is not property, because it will fail if the ancestor makes a deed or will. In like manner, as a remainder or reversion after an estate-tail might be divested if the tenant-in-tail saw fit to suffer a common recovery, it was not "property" within the meaning of the constitutional prohibition;² and while a husband's right to the existing choses in action or chattels of his wife cannot be taken from him by a statute, the legislature may well provide that her subsequent acquisitions shall be exclusively her own.³ For like reasons the right of survivorship incident to joint tenancy is subject to legislative control, and may be abrogated, because the statute does no more than any one of the

¹ *Westervelt v. Gregg*, 12 N. Y. 202, 208; *Norris v. Beyea*, 13 Id. 274, 288; *Dunn v. Sargent*, 101 Mass. 336.

² *De Mill v. Lockwood*, 3 Blatchford, 56.

³ *Westervelt v. Gregg*, 12 N. Y. 202. See *Moninger v. Ritter*, 101 Pa. 298, where the principle was applied to the husband's tenancy by the curtesy in land acquired subsequently to the statute.

tenants might have effected by conveying his interests to a stranger or instituting proceedings in partition.¹

If this principle is carried to its legal results, it will follow that there can be no right of property or obligation in a contract which cannot be enforced without the consent of the debtor, and consequently none in the agreements made or debts due by a State. Such at least would seem to be the view taken in the recent case of *The Railroad Co. v. Thompson*,² where it was held that Tennessee might withdraw the consent which she had given to be sued in her courts for the demand in question, because were proceedings instituted by the creditor and carried to a successful result, the courts would have no power to issue an execution, and the judgment would remain a dead letter unless the legislature thought fit to make an appropriation.

A chose in action, whether *ex contractu* or *ex delicto*, obviously does not cease to be property, within the constitutional safeguard on passing into judgment, and on the contrary acquires a higher claim to consideration; but a law which incidentally renders the amount less susceptible of collection is not necessarily a deprivation,³ because procedure is under the control of the legislature and may be regulated as they think proper, so long as a sufficient remedy is given or remains.⁴

It is clear, under the foregoing principles, that a mere expectancy — as, for instance, the right of a child to succeed to the estate of a living parent — is not property in the sense of the constitutional prohibition, because *Nemo est hæres viventis*, and no one can have a valid claim to that which belongs to another who may dispose of it at pleasure.⁵ Hence the legislature may provide that children born out of wedlock shall share in their mother's estate, or even prefer them to her lawful offspring, although the power must be exercised during the parent's lifetime, and will cease at her death.

¹ *Wildes v. Van Voorhis*, 15 Gray, 147; *Dunn v. Sargent*, 101 Mass. 336; *Bombaugh v. Bombaugh*, 11 S. & R. 192.

² 101 U. S. 339.

³ *Louisiana v. New Orleans*, 109 U. S. 285, 295.

⁴ See *ante*, p. 705.

⁵ See *Dunn v. Sargent*, 101 Mass. 336.

It is on a like ground that estates-tail may be converted legislatively into estates in fee, although the effect is to preclude the reversioner or remainder-men. For as the tenant-in-tail has the *jus disponendi*, the land is virtually his, and the statute does no more than he might do through a common recovery.¹

Agreeably to some of the decisions, an inchoate right of dower is not an estate or interest, but a claim depending on contingencies that may never take effect, which cannot be assigned or granted, and is not therefore such property as the Constitution intended to protect.² The right does not, according to this view, result from the marriage contract, but stands on the foundation of positive law, and will consequently fail if the law is changed before it goes into effect.³ A like view has been taken in other cases of tenancy by the curtesy while depending solely on the marriage, and before it becomes absolute through the birth of issue.⁴

The point actually determined in *Moore v. The Mayor of New York* was, however, that the husband's land might be taken by virtue of the right of eminent domain without notifying the wife, and that the entire compensation might be paid to him as the owner of the fee. It was a question of procedure rather than title, and does not warrant the inference that the right of a wife to have one third of her husband's estate set apart for her at his death can be defeated arbitrarily by a statute passed after the marriage. Such certainly was not the inclination of the common law, which, on the contrary, favored dower on equitable as well as legal grounds. It was therefore valid not only as between the parties, but as against a purchaser for value from the husband, and the widow might come into equity for discovery in aid of her legal remedy.⁵

¹ Cooley on Constitutional Limitations, 360; *De Mill v. Lockwood*, 3 Blatch. 56.

² *Barbour v. Barbour*, 46 Me. 9; *Moore v. The Mayor of New York*, 8 N. Y. 110; *Pratt v. Taft*, 14 Mich. 191; *Magee v. Young*, 40 Miss. 164; *Melizet's Appeal*, 17 Pa. 419.

³ *Barbour v. Barbour*, 46 Me. 9.

⁴ *Long v. Marvin*, 15 Mich. 60; *Barbour v. Barbour*, 46 Me. 9. See *Monenger v. Ritner*, 104 Pa. 298.

⁵ Story's Eq. Jurisprudence, sections 627, 628, 629.

Such was the view taken by the Supreme Court of Massachusetts in *Dunn v. Sargent*,¹ although the point did not actually arise. In like manner, although the husband's right as tenant by the curtesy is contingent on the birth of issue and the death of his wife, it still is property on which he may have relied as a means of fulfilling the obligation which will devolve upon him in the event of his becoming a father; and if it can be taken from him retroactively, no contingent right is secure.

Whatever the rule may be on this head, a right is not less property, within the constitutional safeguard, because it depends on a future event and the persons entitled under it are uncertain or not yet born. Such an interest may not be capable of assignment, but it is something which the owner is entitled to retain and, should it ever become consummate, to enjoy. As was said in *Westervelt v. Gregg*,² while a chose in action differs from a chose in possession in being a right to sue for and recover, as distinguished from a right to hold and enjoy, it is none the less a right which will presumably result in fruition, and that should be beyond the reach of arbitrary power. No one would contend that the legislature can confiscate a debt because it is valueless unless the debtor is willing or can be compelled to pay. So, though an assignee of a chose in action has not the legal title, but simply a power or authority to collect, arising from an implied contract with the assignor, it still is property, and protected by the constitutional guaranty. So a husband's common law right to his wife's chose in action was as much beyond the reach of retroactive legislation as his lands or chattels, although it could only be exercised during coverture or under letters testamentary or of administration, and would fail if he died while the claim was still outstanding and neither reduced to possession nor assigned.³ The court held, in *Westervelt v. Gregg*, that he was virtually an assignee of every claim which his wife held at the date of the marriage or which accrued subsequently during coverture while the law was unchanged; and if, like an assignee, he had a mere authority to collect, it was still

¹ 101 Mass. 336.

² *Westervelt v. Gregg*, 12 N. Y. 202.

³ 12 N. Y. 202.

an irrevocable power, coupled with an interest, of which he could not constitutionally be deprived.¹

In *Dunn v. Sargent*,² a husband's interest in a remainder in personal property already bequeathed to his wife in the

¹ In *Westervelt v. Gregg*, 12 N. Y. 202, 207, "the counsel for the appellant referred in argument to the case of *Clark v. McCreary*, 12 Smedes & Marsh. 347, which was decided under a statute of Mississippi, and presented a question similar to that which is raised here. In that case the court placed their opinion upon the ground that the right of the husband to reduce his wife's choses in action into possession was not a vested interest, — that is, as they explain it, the property is not vested in possession; and they quote a definition, given by Chancellor Kent, that 'an estate is vested when there is an immediate right of present enjoyment, or at present fixed right of future enjoyment' (4 Kent Com. 202). They further say that 'the husband's interest in the wife's choses in action is a qualified right, upon condition that he reduce them into possession during coverture. This condition is manifestly a condition precedent, and it is indispensable that the condition precedent should take place before the estate can vest. In this case the law was passed before the condition was performed, and intercepted the right of the husband.' Now, it seems to me that the whole of this reasoning is founded upon a fallacy. A right to reduce a chose in action to possession is one thing, and a right to the property which is the result of the process by which the chose in action has been reduced to possession is another and a different thing. But they are both equally vested rights. The one is a vested right to obtain the thing, with the certainty of obtaining it by resorting to the necessary proceedings, unless there be a legal defence; and the other is a vested right to the thing after it has been obtained. This distinction is entirely lost sight of in the opinion of the learned court in the case last cited. Upon the argument of this appeal the counsel for the appellant defined the interest of the husband in his wife's legacy to be an authority to collect it. I do not object to this definition if we add the words 'for his own benefit.' In the case of *Gallego v. Gallego*, 2 Brock. 286, Chief-Justice Marshall said, 'The husband has no interest in the legacy of his wife, he has only a power to make it his by reducing it to possession.' But the words 'authority' and 'power,' as here used, are synonymous with 'right.' This right, it is true, is personal, and no one can exercise it but the husband himself or his assigns, or, under certain circumstances, his representatives. It is not a right which can be taken in execution (*Price v. Sessions*, 3 How. 624), neither will a court of equity compel a husband to exercise it in favor of his creditors (2 Brock, 286); but it is none the less valuable to the husband on that account."

² 101 Mass. 336.

event of her surviving her brother, to whom it had been left for life, was in like manner held to be so far vested that it could not be taken away by a statute passed before the happening of the contingency without compensation, although the first holder was still living, and it was uncertain whether the bequest over would take effect. The court said, "It is quite clear that if, by the termination of the life estate of her brother Benjamin, the contingency upon which her husband was entitled to reduce the property to his own possession had happened before the passage of the statutes, the fact that he had not actually exercised that right would not subject his interest in the property to their operation.¹ Even during the continuance of the life estate his right in this property of his wife was, according to the adjudication of this court in *Gardner v. Hooper*,² a valuable and assignable interest, which, though contingent in possession and enjoyment, was vested in right, and of which, therefore, he could not be deprived by act of the legislature without compensation.³ This interest was wholly different from a husband's expectation of a right in property to accrue to his wife after the passage of the statute, which, like that of an heir in the estate of his ancestor, would have been an interest vested neither in possession nor in right, but a bare possibility, and therefore liable to be defeated by a change in the law at any time before the right accrued. It has indeed been held by the courts of some States that a wife's right of dower may be cut off by an act of the legislature at any time before it becomes consummate upon the death of the husband.⁴ But those decisions proceed upon the theory that such a right is not an interest in property, but a mere possibility, created by law, and not in any sense vested or assignable until after the husband's death. And it may well be doubted whether they are consistent with the law of this Commonwealth, by which an inchoate right of dower is recognized as something more than a

¹ *Westervelt v. Gregg*, 12 N. Y. 202; *Norris v. Beyea*, 13 Id. 274, 288.

² 3 Gray, 398.

³ *Jackson v. Sublett*, 10 B. Monr. 467.

⁴ See the cases collected in 2 Scribner on Dower, c. 1.

possibility, and as an interest in property which equity will, under some circumstances, protect at the suit of the wife in the lifetime of the husband."¹

It needs no argument to prove that a man's papers are property which may be of the utmost value and significance, and that an arbitrary seizure of them is among the deprivations which the Fifth and Fourteenth Amendments forbid.² But the question has another and important bearing, because the Fifth Amendment provides, in accordance with the common law, that "no man shall be compelled in a criminal proceeding to bear witness against himself," while the Fourth prohibits "unreasonable searches and seizures."³ These clauses relate only to the United States; but the Fourteenth Amendment, that "no State shall deprive any person of life, liberty, or property without due process of law," seems broad enough to cover the same ground, because the compulsory extortion of a man's own testimony or of his papers to be used as evidence to convict him of crime or to forfeit his goods is an abuse of process.⁴ A conviction obtained by such means would obviously be erroneous, and a sentence of fine and imprisonment founded upon it a deprivation of which the accused might justly complain. These privileges, which came with the colonists from England, and were engrafted from the English Constitution on our own, were vindicated in the memorable trials which grew out of the general warrants issued by the Secretary of State, Lord Halifax, for the arrest of persons charged with the publication of libels against the government in the *North Briton*, and *British Freeholder*, and the seizure of their papers.⁵

¹ *Davis v. Wetherell*, 13 Allen, 63.

² *Entick v. Carrington*, 2 Wilson, 275; 19 State Trials, 1029, 1066; *Boyd v. The United States*, 116 U. S. 616.

³ See *ante*, p. 509.

⁴ See *Horstman v. Kauffman*, 97 Pa. 147, where an act providing for the compulsory examination of debtors under a proceeding issued to attach their goods on the ground of fraud was held to be unconstitutional.

⁵ *Leach v. Mooney*, 19 State Trials, 1001; 3 Burr 1692, 1767; *Entick*

In some of these instances the warrant was simply against the authors, printers, and publishers of the North Briton, to take their papers, without naming the persons to be apprehended; in others the persons accused were named, without specifying the papers; and they all gave a dangerous latitude which was abused by the messengers to whom they were intrusted for execution. Wilkes and some sixteen others were taken into custody under the instrument, their dwellings ransacked, and their papers carried away for inspection by the officers of the Crown. They brought actions of trespass and false imprisonment in the Common Pleas, which were sustained by Chief-Justice Pratt (afterwards Lord Camden); and the juries gave heavy damages, amounting in the suit of Wilkes against Lord Halifax to four thousand pounds. One of these cases was taken on a writ of error to the King's Bench and affirmed; Lord Mansfield holding the warrant illegal because two things ought to appear in every such instrument, — that an offence has been committed, and that there is probable cause for believing that the person to be apprehended was guilty of the offence; and a general warrant leaves the latter point to an officer who is not a magistrate, and may be unacquainted with the evidence. In another case, where the person was named, but the warrant gave a general authority to take all his books and papers, without specifying which, Lord Camden dismissed a motion for a new trial on broader grounds.¹ A man has a right of property in his papers which cannot be taken from him because he is charged with an offence of which he may be innocent. There is a manifest difference between such a proceeding and a search-warrant for stolen goods. In the one the owner is simply empowered to retake his property and place it in the hands of a public officer until the felon's conviction entitles him to restitution. In the other his property is taken from his possession to be used as a weapon of offence, and matters that were intended only for his own eyes divulged, although their nature

r. Carrington, Id. 1029; Wilkes v. Wood, Id. 1153; 1 Lloftt, 1; Wilkes v. Lord Halifax. 2 Wilson, 256; 19 State Trials, 1406.

¹ Entick v. Carrington, 19 State Trials, 1029.

may be such that they cannot be made public without danger to his liberty, estate, or reputation. "The great end," he said, "for which men enter into society is to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing,—which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books and see if such a justification can be maintained by the text of the statute law or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society. . . .

“Lastly, it is urged, as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner’s custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are crimes—such, for instance, as murder, rape, robbery, and housebreaking, to say nothing of forgery and perjury—that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.”

Great as was the weight due to these principles as they stood in the books of the common law, they derived new value from the recent case of *Boyd v. The United States*,¹ where Lord Camden’s judgment was cited as the source of the prohibition of unreasonable searches and seizures in the Fourth Amendment, and as a guide which should be followed in averting the abuses which that is intended to prevent. The question arose under an act of Congress authorizing the courts of the United States “in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the libel to be taken as confessed.” This act, like some other chapters of the Revised Statutes, was drawn in view of the recent civil war, with a disposi-

¹ 116 U. S. 616.

tion to carry the prerogative of the government to the utmost verge in cases which were more wisely dealt with by the statesmen who framed the Constitution and set its wheels in motion. The judiciary act of 1789 confined the right to compel the production of books and papers to "cases and under circumstances where the parties might be compelled to produce the same in the ordinary course of proceedings in chancery." There could be no surer test of the method best calculated to promote the ends of justice. As Mr. Justice Bradley remarked, the Court of Chancery had been for generations engaged in devising the rules to be observed in granting discovery on bills filed for that purpose. To go farther might well be deemed hazardous; and one of these rules was not to decree a discovery which might tend to convict the party of a crime or to forfeit his property. A compulsory discovery, by extorting the party's oath or compelling the production of his papers, was contrary to the principles of the common law and abhorrent to the feelings of Englishmen and Americans. It might suit the purposes of a despotic government, but could not endure the atmosphere of personal liberty and political freedom. If the proceeding was criminal in effect to enforce a penalty or forfeiture, it mattered not that it was civil in form, or *in rem*, and did not impose a personal obligation. It might be aimed at the goods, but the loss would fall on the owner; and he ought not to be compelled to produce evidence which would militate against himself as the price of being allowed to claim or vindicate his property. The act of Congress was consequently unconstitutional, and it followed that the order which had been made under it for the production of the invoice, and the admission of the invoice in evidence, were erroneous. The judgment of the circuit court must therefore be reversed.¹

¹ "The principal question, however, remains to be considered. Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws, — is such a proceeding for such a purpose an 'unreasonable search and seizure' within the meaning of the Fourth Amendment of the Con-

In *Horstman v. Kaufman*¹ an act of assembly authorizing the compulsory examination of a debtor under a charge that

stitution, or is it a legitimate proceeding? It is contended by the counsel for the government that it is a legitimate proceeding, sanctioned by long usage and the authority of judicial decision. No doubt long usage, acquiesced in by the courts, goes a long way to prove that there is some plausible ground or reason for it in the law or in the historical facts which have imposed a particular construction of the law favorable to such usage. It is a maxim that *Consuetudo est optimus interpret legum*; and another maxim that *Contemporanea expositio est optima et fortissima in lege*. But we do not find any long usage, or any contemporary construction of the Constitution, which would justify any of the acts of Congress now under consideration. As before stated, the act of 1863 was the first act in this country, and, we might say, either in this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them for the purpose of using them in evidence against him in a criminal case or in a proceeding to enforce the forfeiture of his property. Even the act under which the obnoxious writs of assistance were issued, 13 & 14 Car. II. chap. 11, sect. 5, did not go as far as this, but only authorized the examination of ships and vessels and persons found therein, for the purpose of finding goods prohibited to be imported or exported, or on which the duties were not paid, and to enter into and search any suspected vaults, cellars, or warehouses for such goods. The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto cælo*. In the one case the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law, and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past: 12 Car. II. chap. 19; 13 & 14 Car. II. chap. 11; 6 & 7 Wm. & Mary, chap. 1; Geo. I. chap. 21; 26 Geo. III. chap. 59; 29 Geo. III. chap. 68, sect. 153, etc.; and see the article 'Excise,' etc., in Burn's Justices, and Williams's, *passim*, and Evans's Statutes, ii. 221, sub-pages 176, 190, 225, 361, 431, 447; and the like seizures have been authorized by our own revenue acts from the commencement of the government. The first statute passed by Congress to regulate the collection of duties, the act of July 31, 1789, 1 Stat. 29, 43, contains provisions to this effect. As this act was passed by the same

¹ 79 Pa. 147.

he had fraudulently parted with and concealed his property in order to defraud his creditors, and requiring the production of his books, was declared unconstitutional because, although the proceeding was civil, the debtor might be obliged to reveal that which was a misdemeanor according to the criminal law of Pennsylvania.

The inquiry whether a demand which has been barred by the statute of limitations can be revived by subsequent legislation, is one about which there has been some difference of opinion. Such a statute may operate to extinguish the right or merely preclude the remedy. In the former case the legislature cannot give life to that which for all intents and purposes is extinct;¹ but the rule is not so clear as regards the latter. It has been said that a debt or chose in action subsists notwithstanding the efflux of the time prescribed for enforcing it by suit, and the legislature may revive the right to sue.² An adverse possession for twenty-one years is, on

Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment. So, also, the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, are necessarily excepted out of the category of unreasonable searches and seizures. So, also, the laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling, etc., are not within this category. *Commonwealth v. Dana*, 2 Metcalf (Mass.), 329. Many other things of this character might be enumerated. The entry upon premises, made by a sheriff or other officer of the law for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits to be applied to the payment of a judgment against him, obnoxious to those amendments." *Boyd v. United States*, 116 U. S. 622.

¹ *Moore v. The State*, 43 N. J. Law, 202.

² *Campbell v. Holt*, 115 U. S. 620.

the contrary, held to confer an absolute estate on the tenant as against every one whose right had accrued, and might have been enforced by entry. The outstanding title is extinguished or destroyed, not suspended; and an act assuming to reinstate the owner is not so much the restoration of a former right as the creation of a new one.¹ "The lapse of time," said Swayne, J., in *Leffingwell v. Warren*, "limited by such statutes, not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder. It tolls the entry of the person having the right, and consequently, though the very right be in the defendant, yet he cannot justify his ejecting the plaintiff."² "Suppose," said Rogers, J., in *McCabe v. Emerson*, "after a title acquired to a tract of land under the act of limitations, the legislature should extend the time; or suppose a writ of error barred by lapse of time, — would any person contend that the legislature could constitutionally affect the rights which had thus become vested?"³

¹ *Ervine's Appeal*, 16 Pa. 256, 265; *Moore v. Luce*, 29 Id. 262; *Morford v. Cook*, 24 Id. 92; *Robb v. Harlan*, 7 Id. 292; *Palaiet's Appeal*, 67 Id. 479, 494; *McCabe v. Emerson*, 18 Id. 112; *Leffingwell v. Warren*, 2 Black, 599; *Croxall v. Shererd*, 5 Wallace, 268; *Dickerson v. Colgrove*, 100 U. S. 578, 583; *Bicknell v. Comstock*, 113 Id. 149; *Campbell v. Holt*, 115 Id. 620, 623.

² *Buller's N. P.* 103; *Stocker v. Berny*, 1 Lord Raymond, 741; *Taylor v. Harde*, 1 Burr. 60; *Barwick v. Thompson*, 7 Term Reps. 492; *Beckford v. Wade*, 17 Vesey, 87; *Moore v. Luce*, 29 Pa. 260; *Thompson v. Greene*, 4 Ohio St. 223; *Newcombe v. Leavitt*, 22 Ala. 631; *Wynn v. Lee*, 5 Ga. 217; *Chiles v. Jones*, 4 Dana, 483.

³ See *Palaiet's Appeal*, 67 Pa. 479, 494; *Billings v. Hall*, 7 Cal. 4; *Knox v. Cleveland*, 13 Wis. 245; *Baggs's Appeal*, 43 Pa. 512. See *Davis v. Meade*, 13 S. & R. 221.

"It has been repeatedly adjudged that a statute which bars all remedy gives a perfect title, with all its incidents. *Knox v. Cleveland*, 13 Wis. 249; *Moore v. Luce*, 29 Pa. 262; *Leffingwell v. Warren*, 2 Black (U. S.), 599; 2 Wash. Real Prop. 574; *Cooley's Const. Lim.* 365. In *Moore v. Luce*, Chief-Justice Lewis said laws never deliberately take away all remedy without an intention to destroy the right. When all remedies are taken away after a specified period of neglect in asserting rights, and when this is done for promoting the best interests of society, the right itself is destroyed. Said Judge Swayne in *Von Hoffman v.*

In like manner, when the period within which an action may be brought for the unlawful taking or detention of goods or chattels has gone by, the right is extinct, as well as the remedy, and a subsequent repeal of the statute will not enable the injured party to recover.¹ It is a logical consequence of this doctrine that as the general issue in such cases is an implied denial of the plaintiff's right, the lapse of time may be relied on as a defence without pleading the statute.²

It is also clear that the right to a bill of review or writ of error cannot be revived after it has expired by the lapse of time, because such an enactment opens a judgment which has become absolute, and remits the parties to the position which they held at the commencement of the suit, and is

City of Quincy, 4 Wall. 535, 552, 'without the remedy the contract may, in the sense of the law, be said not to exist.' And Washington, J., in *Green v. Biddle*, 8 Wheat. 1, 76, 'if there be no remedy, the law necessarily presumes a want of right.'

"Now in all these classes of cases the courts have decided that the rights acquired by reason of these statutes of limitation, whether they were rights of property or simply rights to defeat suits, and whether the suits arose *ex contractu* or *ex delicto*, could not be taken away by the repeal or modification of the law."

In *Wright v. Oakley*, 5 Met. 400, 410, Chief-Justice Shaw intimated that it might not be proper, in technical strictness, to say that a man had a vested right to plead the statute of limitations so that it could not be taken away by an express act of the legislature; but he declined to give such an effect of the statute then before him, or definitely to concede any enactment could so operate. In *Ball v. Wyeth*, 99 Mass. 338, the court still expresses "grave doubt" of the authority of the legislature to give an action after the bar of the statute is complete. But other tribunals have gone farther than the expression of doubts, and have distinctly denied the existence of such authority. In the following cases it was directly adjudged that the legislature had not the power: *Naught v. O'Neal*, 1 Ill. 29; *Sprecker v. Wakeley*, 11 Wis. 432; *Parish v. Eager*, 15 Id. 532; *Baggs's Appeal*, 43 Pa. 512; *McKinney v. Springer*, 8 Blackf. 506; *Stipp v. Brown*, 2 Ind. 647; *Davis v. Minor*, 1 Howard (Miss.), 183; *Woodman v. Fulton*, 47 Miss. 682; *Martin v. Martin*, 35 Ala. 560; *Girdner v. Stephens*, 1 Heisk. 280; *Atkinson v. Dunlap*, 50 Me. 111; *Ryder v. Wilson's Executors*, 12 Vroom, 9.

¹ *Smart v. Baugh*, 3 J. J. Marsh. 364; *Jones v. Jones*, 18 Ala. 248; *Campbell v. Holt*, 115 U. S. 620, 624.

² See *Campbell v. Holt*, 115 U. S. 620, 624.

not only a "deprivation without process," but an assumption of judicial power. Such is the rule in Pennsylvania, and it has been so laid down in other States.¹ The right to an appeal, or writ of error, may however be taken away legislatively before it has been exercised, or even while the proceeding is pending and undetermined in the appellate court.²

Whatever the rule may be under other circumstances, there is no doubt that a man who has been exonerated from liability to an indictment under the operation of a statute of limitations, cannot be again rendered answerable by its repeal, consistently with the prohibition of *ex post facto* laws, and the deprivation of life and liberty without due process of law.³ On the other hand, so long as the period of limitation is still running, either in criminal or civil suits, it is subject to the control of the legislature, and may be extended if they think proper, although it is drawing to a close and would expire in the course of another day but for their intervention.⁴

If we now turn to the question, Will the repeal of the statute of limitations revive a debt which is already barred? it admits of but one reply if there can be a right of property in a defence as well as in a cause of action. As a general proposition, this is indisputable. No one maintains that a statute can revive a debt which has been extinguished by a release, or an accord and satisfaction, or the cancellation of the bond in which it originated. But it is said that where, as in the case of a usurious contract, a legislative act creates the bar, it may be removed by the same means. Such, agreeably to the authorities, is the rule with regard to contracts prohibited by law, or founded on a gaming, usurious, or other illegal consideration; and in *Campbell v. Holt*⁵ it was extended to

¹ *McCabe v. Emerson*, 18 Pa. 111; *Baggs's Appeal*, 43 Id. 512; *Burch v. Newbury*, 10 N. Y. 374; *Hill v. Sunderland*, 3 Vt. 507. See *State v. Northern Central R. R. Co.*, 18 Md. 193.

² *Grover v. Coon*, 1 N. Y. 536; *Baltimore & Potomac R. R. Co. v. Grant*, 98 U. S. 398.

³ See *ante*, p. 571; *Moore v. State*, 42 N. J. Law (13 Vroom), 208; *State v. Keith*, 63 N. C. 140; *Kring v. Missouri*, 107 U. S. 221, 231.

⁴ *Commonwealth v. Duffy*, 96 Pa. 509; *Pleasants v. Rohrer*, 17 Wis. 577.

⁵ 115 U. S. 620. See *ante*, p. 792.

debts barred by the statute of limitations. The court held that the statute operates in such cases on the remedy, and not on the right, which remains and may be a consideration for a new promise ; and hence if the law is repealed, there is no reason why the creditor should not have his due. If a man took or detained goods or land which did not belong to him, and the owner failed to sue within the appointed time, the wrong-doer acquired a vested right which was beyond the reach of retroactive legislation.

Debts stood on a different footing, because the lapse of time does not impair the right, and simply takes away the remedy ; and if the legislature think proper to restore the latter, there is no reason why the creditor should not have his due.

Bradley and Harlan, J.J., dissented on grounds which appear unanswerable ; and a consideration of the subject will, I think, show that there is no such analogy as the majority of the court supposed between a plea of usury and a plea that the cause of action did not accrue within six years. The statute of limitations proceeds on the assumption that after six years have gone by it may be impracticable to determine which party has the right, and therefore leaves it to the defendant to say whether the debt is really due. If he makes a new promise or admits the justice of the demand in any other way, and the case is made out in other particulars, there can be no doubt of the creditor's right to judgment. The power so conferred on the debtor of acting as a judge in his own case is a valuable privilege, which cannot be taken away after it has become absolute through the lapse of time, without the deprivation which the Constitution forbids. It is because the operation of the statute is under the defendant's control, and he may decide whether the debt shall be paid, that the defence should be considered as his property, and cannot be repealed by the legislature. When, on the other hand, the suit is founded on an act or agreement forbidden by law, the legislature may render the contract binding retroactively, because the prohibition is imposed for the public good, and it is for the State to say whether it can safely be laid aside.

There is another consideration which should not be overlooked. Men generally suppose that when six years have elapsed since work was done or a service rendered, it no longer subsists as a cause of action, and destroy or neglect to preserve the evidence which shows that nothing was due or that the debt was paid. A repeal of the statute consequently leaves them open to demands which could easily have been resisted had they not relied on the assurance which it held forth, and is in effect a breach of public faith.

The power of the legislature to reinstate a remedy which they have abrogated, like the question, Can a statutory defence be waived by the party whom it is sought to charge? seemingly depends on whether the object of the disabling statute is the prevention of acts which are injurious to the community, or to afford a safeguard to individuals if they so desire. In the former case the defendant cannot give validity to that which the statute on public grounds condemns; in the latter he may bind himself anew by a promise.¹ A defence on the ground of illegality — that the consideration is usurious, or a gambling debt — falls under the first-named head; a certificate of bankruptcy, or the bar of the statute of limitations, under the second. A promise to pay a usurious debt is as invalid as was the original contract, because both are equally contrary to the policy of the law; but there is no such objection to a promise to fulfil a contract which is invalidated by fraud or a discharge in bankruptcy. Conversely, the legislature may well confirm the contract in the former instance if they deem the disability no longer essential to the general welfare; but they should have no such power in the latter where the privilege concerns the individual, and not the community at large. It is accordingly established in Pennsylvania and Massachusetts, and generally in the United States, that the inability to enforce an illegal contract or one founded on an act forbidden by law, is a penalty which may

¹ See Hare on Contracts, 285, 291, 296; Haydock v. Tracy, 3 W. & S. 507; Foreman v. Ahl, 55 Pa. 325; Day v. McAllister, 15 Gray, 433; Brock v. Hook, L. R. 6 Exch. 89; McHugh v. Schuylkill Co., 67 Pa. 391; Shisler v. Vandike, 92 Id. 447.

incidentally benefit the debtor, but is not imposed with that design, and may therefore be repealed without prejudice to any right which he is entitled to assert.¹ On the other hand, the weight of authority is not less clearly that when the bar of a statute becomes complete through the lapse of time, it is beyond the reach of the legislature, because the effect of abrogating it is to compel the defendant to render that which, as the law previously stood, he would have been entitled to retain.²

¹ See *ante*, p. 742; *Hewitt v. Wilcox*, 11 Metcalf, 154; *Hampton v. The Commonwealth*, 19 Pa. 329; *Baughner v. Nelson*, 9 Gill, 304; *Butler v. Palmer*, 1 Hill, 324; *Curtis v. Leavitt*, 15 N. Y. 9; *Bank v. Allen*, 28 Conn. 97; *Welch v. Wadsworth*, 30 Id. 149; *Grimes v. Doe*, 8 Blackford, 371; *Wood v. Kennedy*, 19 Ind. 68; *Danville v. Pace*, 25 Ga. 117; *Par-melee v. Lawrence*, 48 Ill. 331; *Ewell v. Daggs*, 108 U. S. 143; *State v. Norwood*, 12 Md. 195; *Lewis v. McElvain*, 16 Ohio, 347; *Thompson v. Morgan*, 6 Minn. 292.

² See *Ryder v. Wilson*, 12 Vroom, 41 N. J. Law, 9, 11; *Moore v. The State*, 42 Id. 208; *Davis v. Minor*, 1 Howard (Mass.), 183; *Bigelow v. Bemis*, 2 Allen, 496; *Wright v. Oakley*, 5 Metcalf, 400; *Krisman v. Cambridge*, 121 Mass. 558; *McKinny v. Springer*, 8 Blackford, 506; *Sprecker v. Wakeley*, 11 Wis. 432; *Parish v. Eager*, 15 Id. 532; *Woodman v. Fulton*, 47 Miss. 682; *Martin v. Martin*, 35 Ala. 560; *Atkinson v. Dunlap*, 50 Me. 117; *Woart v. Winnick*, 3 N. H. 473.

The subject cannot well be put in a clearer light than in the following extract from the dissenting opinion of Mr. Justice Bradley in *Campbell v. Holt*, 115 U. S. 620, 630 :—

“ I think that when the statute of limitations gives a man a defence to an action, and that defence has absolutely accrued, he has a right which is protected by the Fourteenth Amendment, which declares that ‘ no State shall deprive any person of life, liberty, or property without due process of law,’ was intended to protect every valuable right which a man has. The words ‘ life, liberty, and property ’ are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term ‘ property ’ in this clause embraces all valuable interests which a man may possess outside of himself; that is to say, outside of his life and liberty. It is not confined to mere tangible property, but extends to every species of vested right. In my judgment, it would be a very narrow and technical construction to hold otherwise. In an advanced civilization like ours, a very large proportion of the property of individuals is not visible and tangible, but consists in rights and claims against others or against the government itself.

“ Now, an exemption from a demand or an immunity from prosecution

in a suit is as valuable to the one party as the right to the demand or to prosecute the suit is to the other : the two things are correlative; and to say that the one is protected by constitutional guaranties, and that the other is not, seems to me almost an absurdity. One right is as valuable as the other. My property is as much imperilled by an action against me for money as it is by an action for my land or my goods. It may involve and sweep away all that I have in the world. Is not a right of defence to such an action of the greatest value to me? If it is not property in the sense of the Constitution, then we need another amendment to that instrument. But it seems to me that there can hardly be a doubt that it is property. The immunity from suit which arises by operation of the statute of limitations is as valuable a right as the right to bring the suit itself; it is a right founded on a wise and just policy. Statutes of limitation are not only calculated for the repose and peace of society, but to provide against the evils that arise from loss of evidence and the failing memory of witnesses.

“ The fact that this defence pertains to the remedy does not alter the case. Remedies are the life of rights, and are equally protected by the Constitution. Deprivation of a remedy is equivalent to a deprivation of the right which it is intended to vindicate, unless another remedy exists or is substituted for that which is taken away. This court has frequently held that to deprive a man of remedy for enforcing a contract is itself a mode of impairing the validity of the contract. And, as before said, the right of defence is just as valuable as the right of action. It is the defendant's remedy. There is really no difference between the one right and the other in this respect.

“ It is said that the statutory defence acquired and perfected in one State or country is not, or may not be, a good defence in another. This, if it were true, proves nothing to the purpose. It is a vested right in the place where it has accrued, and is an absolute bar to the action there. This is a valuable right, although it may be ineffective elsewhere. Again, it is said that a debt barred by the statute is a good consideration for a promise to pay it, — which shows that the statute does not extinguish the debt. This is no answer to the position that the statutory defence is a valuable and an absolute right. A new promise is an implied admission that the debt has not been paid, and amounts to a voluntary waiver of the statute.”

LECTURE XXXVIII.

The Fifth and Fourteenth Amendments forbid the Deprivation of Life, Liberty, or Property without Notice or a Hearing by some duly constituted Tribunal. — The Legislature cannot adjudicate or retroactively declare the Meaning of a Statute. — The Law of the Land is the Rule existing when the Right in Question was acquired, as interpreted and applied by the Courts. — Acts ordering a Re-hearing or New Trial are Invalid. — The Want of Jurisdiction cannot be cured retroactively by a Statute. — Either Branch of Congress may make Rules for the Preservation of Order and punish a Violation of them as Contempt. — The House of Representatives or Senate cannot compel the Production of Papers or the Attendance of Witnesses in Civil Cases, although the Interests of the United States are involved. — Their Power in this Regard in the Preparation and Trial of an Impeachment, or the Investigation of Charges which may lead to the Expulsion of a Member.

THE Constitutional provision that no person shall be deprived of life, liberty, or property without due process of law, or, in other words, without a day in court and opportunity for being heard, obviously requires that questions of right shall be determined by the judicial department of the government; and hence a statute declaring the land or goods in suit are the plaintiff's, or that a deed to him from the defendant is valid, will be equally inoperative whether it is or is not in conformity with the truth, which will remain open for decision as though no such legislation had intervened.¹

The legislature may provide retroactively that conveyances of a certain kind shall be good, notwithstanding technical or clerical errors or defects, but they cannot declare that a particular conveyance is valid, or enforce it against the grantor.²

¹ The Mayor v. Scott, 1 Pa. 309; Lambertson v. Hogan, 2 Id. 22, 25; Davidson v. New Orleans, 96 U. S. 97, 102.

² Norman v. Heist, 5 W. & S. 171; Taylor v. Porter, 4 Hill, 146; Westervelt v. Gregg, 12 N. Y. 209; Wynehamer v. The People, 13 Id.

The words "due process of law" cannot mean less than a prosecution or suit instituted and conducted according to the customary forms and solemnities for ascertaining guilt or determining the title to property. Life, liberty, and property are classed in the same category, and the same measure of protection is extended to each; and if property can be divested without a trial and judgment, there is no security for life or liberty. If the legislature may take the property of A and bestow it on B, they may take A himself and imprison him or put him to death.¹ The law of the land is the rule existing when the right in question was acquired, as interpreted and applied by the courts.²

It must be ascertained judicially that the citizen has committed some offence which renders him amenable to the criminal law, or that some one has a better title than himself, before he can be deprived of what he holds or owns, or so hindered in the exercise of his natural rights as to abridge his freedom. Such a conclusion may be drawn from the tenor of the Constitutions of the several States and the genius of a system which has for its object the maintenance of individual rights as well as to render the people as a whole politically free, and is a necessary inference from the clause under consideration in this lecture.³

In *Norman v. Heist*,⁴ Ann Ottinger died leaving two brothers, to whom her estate came under the existing law, and a natural son, Christopher Norman, who was not capable of inheriting from either parent. He died, and the legislature enacted that his children should be as able and capable to

395, 419, 468; *Norris v. Beyea*, Id. 273, 288; *Rockwell v. Nearing*, 35 Id. 302.

¹ *Palairret's Appeal*, 67 Pa. 479, 485; *Westervelt v. Gregg*, 12 N. Y. 209.

² *Wynehamer v. The People*, 13 N. Y. 378, 393; *Hake v. Henderson*, 4 *Devereux*, 15.

³ *Calder v. Bull*, 3 Dallas, 386; *Regents v. Johnson*, 9 Gill & J. 365; *Wilkinson v. Leland*, 2 Peters, 657; *Welch v. Wadsworth*, 30 Conn. 149, 155; *Burch v. Newbury*, 10 N. Y. 374; *Lambertson v. Hogan*, 2 Pa. 22, 25.

⁴ 5 W. & S. 171.

inherit and transmit the estate of the said Ann Ottinger as though he had been born in lawful wedlock. The decision was that if the statute divested the estate which had descended to Ann Ottinger's brothers at her death, it was a deprivation without "due process," but that it should be interpreted as meant to give Christopher Norman the inheritable blood which the common law denies to persons whose parents are not married, and enable his children to take whatever property might subsequently descend to them through him on the mother's side.

Such statutes, it was observed, must be read in the light of the constitutional provision "that no citizen shall be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land." "What law? Undoubtedly a pre-existent rule of conduct declarative of a penalty for a prohibited act, not an *ex post facto* sentence or decree made for the occasion. The design is to exclude arbitrary power from every branch of the government; and there would be no exclusion of it if such rescripts were allowed to take effect in the form of a statute."¹

As the legislative department cannot determine which of two contending parties has the right, so they cannot accomplish the same result by declaring the meaning of a pre-existing law contrary to the interpretation which it has received from the judiciary. The legislature enacts, the courts construe; and as the one cannot say what the law shall be, the other cannot declare what it is.²

In *Greenough v. Greenough*,³ the Supreme Court of Pennsylvania had decided that a mark was not a signature within the Pennsylvania Statute of Wills, and the legislature subsequently enacted "that every will and testament heretofore made or hereafter to be made . . . to which the testator hath

¹ *Darmouth College v. Woodward*, 4 Wheaton, 519; *Hoke v. Henderson*, 4 Div. 151; *Norman v. Heist*, 5 W. & S. 171, 173.

² *Lambertson v. Hogan*, 2 Pa. 22; *Reiser v. The Savings Fund*, 39 Id. 137, 145; *Haley v. Philadelphia*, 68 Id. 45; *West Branch Boom Co. v. Dodge*, 31 Id. 285.

³ 11 Pa. 489.

made his mark or cross, shall be deemed and taken to be valid;" and it was held that so far as this statute attempted to define the effect of the pre-existing law on the estates of persons who had died before its passage, it was a usurpation of the judicial province, and as such unconstitutional, and equally so if regarded as an arbitrary deprivation of a vested right. "The legislative, executive, and judicial functions might, if the people so willed, be performed by a single organ, but the people of Pennsylvania had not so willed." They had ordered that the judicial power should be vested in the existing courts and in such other courts as the legislature might from time to time establish. The judicial power of the Commonwealth was its whole judicial power, and the legislature could not exercise any part of it. What the statute under consideration attempted to do was to establish that the mark which the court had declared not to be the signature required by the act of 1833, was such a signature. A mandate that a statute should be interpreted in a particular way relative to a past act, was clearly an exercise of judicial power.

The doctrine of *Bender v. Brownfield*,¹ that the legislature may order a rehearing in a case which has been already considered and adjudged, or that a judgment which has been entered by confession shall be opened and the case sent to a jury, is virtually overruled by this decision and by the judgment in *McCabe v. Emerson*.²

It is established, in accordance with these authorities, that as the legislature cannot enter judgment or decide an issue of fact, so they cannot direct that a verdict or judgment shall be set aside and the case reconsidered.³ "If anything is self-

¹ 2 W. & S. 280.

² 18 Pa. 112, and *Baggs's Appeal*, 43 Id. 512.

³ *Morrell v. Sherburne*, 1 N. H. 199; *Taylor v. Place*, 4 R. I. 324; *Miller v. The State*, 8 Gill, 145; *De Chastellux v. Fairchild*, 15 Pa. 18.

In *Louisiana v. New Orleans*, 109 U. S. 285, the Supreme Court of the United States held that a judgment of damages for a tort may be indirectly impaired by abrogating the means through which it can be enforced, without violating any constitutional provision; but it would seem clear that taking away the remedy for a chose in action is as contrary to

evident in the structure of our government, it is that the legislature has no power to order a new trial or to direct the court to order it, either before or after judgment. The power to order new trials is judicial, but the power of the legislature is not judicial. . . . The legislature has gone no farther than to order a re-hearing on the merits; but it is not more intolerable in principle to pronounce an arbitrary judgment against a suitor than it is injurious in practice to deprive him of a judgment which is essentially his property, and subject him to the risk, expense, and vexation of another contest." An interference on their part or on that of the executive with the administration of justice is contrary to the spirit and forbidden by the letter of the Constitution, and not less objectionable now than when James I. endeavored to influence and overawe Lord Coke.¹

In like manner, a judgment which fails for want of jurisdiction cannot be rendered valid subsequently by a statute, because such an enactment substitutes the legislature for the courts, contrary to the due course of law required by Magna Charta and the Bill of Rights.² Accordingly, when the name of one of several heirs did not appear in the proceedings for the partition of the ancestor's estate, the court held that the decree was invalid as to the party so omitted, and that an act of assembly passed to obviate the defect was unconstitutional.³ The principle was recognized in *Nelson v. Lane*,⁴ though the case was held not to be within its scope. Agreeably to the view taken in this instance, where the orphans' court of a county has jurisdiction of the accounts of an ad-

the Fifth and Fourteenth Amendments as the actual taking of a chose in possession (see the dissenting opinion of Mr. Justice Bradley, and *De Chastellux v. Fairchild*, 15 Pa. 18). A recovery of damages in trover is the substitute given by the law for the thing of which the owner has been deprived; and in denying the power to carry the judgment into execution, the legislature become the accomplice of the wrongdoer and render the spoliation irremediable.

¹ See 12 Coke, 63; also *ante*, p. 164.

² *Prior v. Downey*, 50 Cal. 388; *Demy v. Mattoon*, 2 Allen, 361.

³ *Richards v. Rote*, 68 Pa. 248.

⁴ 79 Pa. 407.

ministrator, it may direct that the real estate of the intestate in another county shall be sold, and the proceeds applied to the discharge of his liabilities; and although the proper course is to apply to the orphans' court of the county where the land is situated, and ask it to execute the decree, still, if the administrator proceeds without such aid, the omission is merely formal, and the sale may be confirmed by a retroactive statute. Lands are chattels in Pennsylvania for the payment of debts; and when it has been judicially ascertained by the proper tribunal that the personal estate is insufficient and that the land must be sold, the power of the administrator is enlarged, and there is no substantial reason why he should not dispose of any land within the State. Despite this argument, *Nelson v. Lane* jars with *Richards v. Rote*, and may appear to some minds irreconcilable with *Dale v. Medcalf*,¹ and *Menges v. Dentler*.² Such a sale passes the title, or it does not: if it does, the intervention of the legislature is superfluous; if it does not, the effect is to supply the want of judicial power by a legislative decree. There is, nevertheless, this difference, — that in *Richards v. Rote* there was an entire want of jurisdiction, arising from an omission to give the notice which is essential to the due course of law; while in *Nelson v. Lane* all the parties were before the court and actually or constructively bound by its decree, and the only question was whether the decree had been properly executed.

The phrase "due process of law" implies, as I have already shown, not only that the proceeding shall be such in form and substance as the established principles of the common law require, but that the tribunal before which it takes place shall be judicial, or, in other words, constituted for the administration of justice in the particular case as well as in others of a like kind, and also that the case shall be within the scope of the powers intrusted to the persons by whom it is adjudged; and if any of these requisites are wanting, the dignity of the officials by whom the sentence is pronounced, and the solemnity of their office, will not render

¹ 9 Pa. 108.

² 33 Pa. 495.

it obligatory, or exonerate the officers who carry it into execution from liability as trespassers.¹

The principle applies in England to the House of Commons and the great courts at Westminster,² and is true in the United States of every body which assumes to exercise judicial power in a given case without being duly authorized for that end. Agreeably to our system, the executive, legislative, and judicial powers are, as we have seen, distributed among the several branches of the government, with the view of keeping each to its appropriate sphere, and Congress can no more adjudicate than judges can enact. It is accordingly conceded that the Senate and House of Representatives have no power severally or conjointly to sit for the punishment of offences against the criminal law, or to determine private rights; and such a proceeding is simply void. There are nevertheless certain purposes for which either body may act judicially; as, for instance, the decision of contested elections, the expulsion of members for bribery or other gross misconduct, the preparation and trial of impeachments, and the repression of offences against the order and discipline which are as essential to the due consideration and passage of a bill as to the rendition of a verdict or judgment. The Constitution accordingly provides that "each House shall be the judge of the election returns and qualification of its own members," "may determine the rule of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member." "The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors." "The House of Representatives shall have the sole power to impeach," and the Senate "to try all impeachments." "When sitting for that purpose they shall be on oath or affirmation." These are important and far-reaching powers, which cannot

¹ The Case of the Marshalsea, 10 Coke, 68, 76; Williamson's Case, 26 Pa. 9, 18; Gilliland v. Sellers, 2 Ohio St. 225; 1 Smith's Lead. Cas. (8th Am. ed.) 1111.

² See *ante*, p. 29

be effectually exercised without the compulsory attendance of witnesses, the production of papers, and the maintenance of order, — in short, all that is essential to the discharge of the judicial function, including the arrest, conviction, and imprisonment of persons who disturb the proceedings or disobey any lawful command while they are going on.

Although these last-named powers are not expressly given, they are a necessary means for the execution of the express powers, without which either House might be harassed by a series of premeditated insults that could not be effectually punished in the ordinary course of justice, and compelled to exclude the public or tolerate indignities which would lower them in the eyes of the nation and hinder the deliberate and orderly consideration of the questions under debate. So much was decided in *Dunn v. Anderson*,¹ where the court also held that the House of Representatives is, like the House of Commons, entitled to the benefit of the presumption, which shields courts of justice, that all has been rightly done unless the contrary appears.² A magistrate's warrant must set forth some sufficient cause; but this rule does not apply to the writs of superior courts, or of either branch of Parliament.³ Such was the view taken at the outset of the government, and prevailing until recently. In the language of Chief-Justice Shippen, as cited by Story, "the members of the legislature are legally and inherently possessed of all such privileges as are necessary to enable them to execute the great trust reposed in them by the people. Assaults on members, attempts to corrupt them, sending challenges to members, and libellous publications reflecting on the Senate have been treated as contempt, and visited in some instances with imprisonment, in others with a reprimand on submission made."⁴

When, however, the question came before the Supreme

¹ 6 Wheaton, 204.

² 1 Smith's Lead. Cas. (8th Am. ed.) 111.

³ *Gossett v. Howard*, 10 Q. B. 359, 452; 1 Smith's Lead. Cas. (8th Am. ed.) 1111.

⁴ Story on the Constitution, section 848.

Court of the United States for the second time in the case of *Kilbourn v. Thompson*,¹ that tribunal took a different view, which limits the jurisdiction of both branches of the national legislature, except as regards the institution and trial of an impeachment. The action was trespass for false imprisonment against the sergeant-at-arms and five members of the House of Representatives, and the defendants relied on a special plea setting forth the following facts and circumstances: That the House of Representatives had adopted a resolution declaring that the firm of Jay Cooke & Co. were indebted to the government of the United States and had a large and valuable interest in the matter known as the Real Estate Pool, which had been settled by the assignee of the firm to the disadvantage of their numerous creditors, including the United States, and ordering the appointment of a special committee of five members to inquire into the transaction, with power to send for persons and papers; that the committee was appointed and commenced the investigation; that the plaintiff was served with a *subpoena duces tecum*, issued by the Speaker of the House, requiring him to appear before the committee and bring with him certain papers, which he knowingly and wilfully refused to produce; that the House then resolved, in pursuance of the report of the committee, that the Speaker should issue his warrant to the sergeant-at-arms for the arrest of the plaintiff and to bring him before the House, which was done; that the plaintiff still contumaciously persisted in his refusal to bring the papers; and that the House then resolved that he was guilty of contempt, and should be held in custody until he was ready to make answer and obey the subpoena. It was strenuously contended that the plea was good in view of the principles governing the jurisdiction of the House of Commons, which had been recognized in *Anderson v. Dunn* as applicable to Congress.

The court held that the supposed analogy to the House of Commons was fallacious. The authority of that body to commit and sentence to imprisonment without cause assigned

¹ 103 U. S. 168.

was a relic from the period when the knights and burgesses sat with the barons in the great council of the realm, which descended to and was still exercised by the Lords as a court of appeal and in the trial of impeachments. The Commons might act judicially in passing a bill of attainder, and had traditionally and from long-established usage the powers of a court of general jurisdiction in issuing process and for the punishment of contempts. The manifest purpose of the American Constitution was to keep the executive, legislative, and judicial branches of the government asunder, and that no one of them should encroach upon the province of the other. The House of Representatives had no jurisdiction over the private affairs of individuals, and could not proceed judicially save with a view to an impeachment, or for the trial of contested elections and the maintenance of the order and discipline requisite for the performance of its functions. The Houses of Congress possessed no general power to punish for contempt, and they could not, by the mere act of asserting a person to be guilty of contempt, establish the right to fine and imprison, or preclude redress through a collateral inquiry into the grounds on which the order was made. The tendency of the modern decisions is that the jurisdiction of a tribunal to render a judgment affecting individual rights is open to inquiry when the judgment is relied on in any other proceeding. In the case under consideration it appeared on the face of the plea filed by the defendants that the House of Representatives had exceeded their powers, and so much of the defence as rested on this ground consequently failed.

Whether a recovery could be had against the members of the House of Representatives who were joined as defendants, depended on the sixth section of the First Article of the Constitution. The plea admitted that they had reported the plaintiff to the House as guilty of a contempt, and had so argued during the debate; and it was a reasonable inference that they participated in the resolution under which he was arrested. Every man who initiates a criminal proceeding without probable cause, or authorizes an illegal arrest, is answerable to the injured party. The plaintiff would conse-

quently be entitled to judgment against all the defendants, were it not that the Constitution provides that "senators and representatives . . . for any speech or debate in either House shall not be questioned in any other place." This clause should be so construed as to effect its object, which is, that the legislative assemblies which represent the nation may proceed freely in the discharge of their duties, without being answerable for their acts except to their constituents. Although the words are "speech or debate," they should be regarded as including everything that is said or done in either House in the transaction of public business. Such was the interpretation given to the principle in England, where it originated, and which had been adopted in the United States.¹ It followed that although the House of Representatives had exceeded their jurisdiction in passing the resolution and ordering the arrest, the members were not civilly or criminally responsible for the mistake. Were not this the rule, every unconstitutional statute might afford ground for an action against the members who enacted it, and the president or governor by whom it was approved. We may infer from this decision that the members of a legislative assembly are in a more favorable position than the judges of courts of record, who may be held answerable in damages for a plain usurpation of power, though not for an erroneous exercise of the powers with which they are clothed.²

¹ Story, Commentaries, section 866; *Coffin v. Coffin*, 4 Mass. 1.

² 1 Smith's Lead. Cas. (8th Am. ed.) 1147, 1149; *Houlden v. Smith*, 14 Q. B. 841.

Coffin v. Coffin, 4 Mass. 1, "was an action for slander, the offensive language being used in a conversation in the House of Representatives of the Massachusetts legislature. The words were not delivered in the course of a regular address or speech, though on the floor of the House while in session, but were used in a conversation between three of the members when neither of them was addressing the Chair. It had relation, however, to a matter which had a few moments before been under discussion. In speaking of this article of the Bill of Rights, the protection of which had been invoked in the plea, the Chief-Justice said: 'These privileges are thus secured, not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions

This decision may be regarded as establishing that the State legislatures are under the same disability as Congress, and cannot, consistently with the Fourteenth Amendment, compel the attendance or production of witnesses or papers in any matter which affects private rights, although the government is also a party in interest. But it would at the same time appear that as the Lower House is endowed with the judicial power of impeachment, and may do all that is requisite for its effectual exercise, it is necessarily empowered to act as an inquest in preparing the articles which take the place of an indictment, and may issue subpoenas and punish any one who is in contempt by refusing to appear.¹

If the conclusion reached in *Kilbourn v. Thompson* is at variance with the practice of the English House of Commons, it is entirely consonant with the principle so well enunciated by Chatham in animadverting on the proceedings of that body against Wilkes, that *jus facere* and *jus dicere* are functions which in the interest of freedom should not be lodged in the same hand.²

of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular, according to the rules of the House, or irregular, and against their rules. I do not confine the member to his place in the House, and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber.' "*Kilbourn v. Thompson*, 103 U. S. 168, 203.

¹ See *Whitcomb's Case*, 120 Mass. 118. "The range of investigation which is open to inquiry by the legislature is unlimited. It is the General Court of the Commonwealth, entitled to inquire into the condition and efficiency and mode of operation of all administrative departments of the government of the State, the proper execution of the laws, and all that concerns the public welfare." *Emery's Case*, 107 Mass. 183.

² *Thackeray's Life of Chatham*, ii. 1391.

Whatever the rule may be as to Congress and the State legislatures, the common council of a city has no power to commit and punish for contempt, even when it consists in a refusal to appear and answer questions put in the course of an investigation into the conduct of the city government; and so much of any statute as undertakes to confer such authority is invalid.¹

¹ Whitcomb's Case, 120 Mass. 118.

"Each House of the British Parliament has the largest power to punish every description of contempt of its authority. Crosby's Case, 3 Wils. 188; s. c. 2 W. Bl. 751; *Burdett v. Abbott*, 14 East, 1, and 5 Dow, 165; Case of the Sheriff of Middlesex, 11 A. & E. 273; s. c. *nom.* The Queen v. Gossett, 3 P. & D. 349. But according to the decisions of most eminent judges, either branch of a colonial legislature has no such power of punishment; *Kielley v. Carson*, 4 Moore P. C. 63; *Hill v. Weldon*, 3 Kerr N. B. 1: even for refusal to attend as a witness when duly summoned: *Fenton v. Hampton*, 11 Moore P. C. 317; or for contempts committed in the face of the house: *Doyle v. Falconer*, L. R. 1 P. C. 328; unless by established usage: *Beaumont v. Barrett*, 1 Moore P. C. 59; or by express act of the imperial Parliament: *Dill v. Murphy*, 1 Moore (N. S.) 487; *Speaker v. Glass*, L. R. 3 P. C. 560. So in *Ex parte Brown*, 5 B. & S. 280, the Court of King's Bench held that the House of Keys, which was the lower branch of the legislature of the Isle of Man, and had also judicial functions in appeals from the verdicts of juries, had no power to commit for contempt when acting in its legislative capacity. It is universally admitted by the law of England that a town or city council has no power, without express act of Parliament, to make an ordinance with penalty of imprisonment, or to commit for contempt of its authority. *Grant on Corp.* 81-86; *Parke, B.*, in 4 Moore P. C. 89; *Baeter v. Commonwealth*, 3 Pa. 253.

"The British Parliament has supreme and uncontrolled power, and may change the Constitution of England and repeal even *Magna Charta*, which is itself only an act of Parliament. But in this Commonwealth the legislative as well as the executive authority and the courts of justice is controlled and limited by the written Constitution, and cannot violate the safeguards established by the Twelfth Article of the Declaration of Rights. *Emery's Case*, 107 Mass. 172.

"In the United States, each branch of a supreme legislature has the same power to commit for contempt as either House of Parliament. Such a power has been adjudged to be inherent in the Federal Senate and House of Representatives, although not expressed in the Constitution. *Anderson v. Dunn*, 6 Wheat 204. A like power doubtless exists in each branch of the General Court of Massachusetts and of other State

legislatures, which are supreme within their sphere, and not, like the colonial assemblies of Great Britain, created by and subordinate to the national legislature. *Burnham v. Morrissey*, 14 Gray, 226; *State v. Matthews*, 37 N. H. 450; *Falvey's Case*, 7 Wis. 630. But in *Anderson v. Dunn* the court said that 'neither analogy nor precedent would support the assertion of such powers in any other than a legislative or judicial body.' 6 Wheat. 233, 234. To such a subject the words of Lord Coke apply with peculiar force: 'When authority and precedent is wanting, there is need of great consideration before that anything of novelty shall be established, and to provide that this be not against the law of the land.' 12 Rep. 75. At the time of the adoption of the Constitution of the Commonwealth it was no part of the law of the land that municipal boards or officers should have power to commit or punish for contempts. The second article of amendment of the Constitution, which first conferred upon the General Court 'full power and authority to erect and constitute municipal or city governments in any corporate town or towns in this Commonwealth,' authorized it to grant to the inhabitants thereof such powers, privileges, and immunities, 'not repugnant to the Constitution,' as it should deem necessary and expedient for the regulation and government thereof, and provided 'that all by-laws made by such municipal or city government shall be subject at all times to be annulled by the General Court.'

"The city council is not a legislature. It has no power to make laws, but merely to pass ordinances upon such local matter as the legislature may commit to its charge and subject to the paramount control of the legislature. Neither branch of the city council is a court, or, in accurate use of language, vested with any judicial functions whatever. Nor are its members chosen with any view to their fitness for the exercise of such functions. To allow such a body to punish summarily by imprisonment the refusal to answer any inquiry which the whole body, or one of its committees, may choose to make, would be a most dangerous invasion of the rights and liberties of the citizen." *Whitcomb's Case*, 120 Mass. 118.

LECTURE XXXIX.

Due Process of Law as guaranteed by the Fourteenth Amendment does not require that the Case shall be submitted to a Jury, and is satisfied when Provision is made for a Hearing by a Duly Constituted Tribunal. — What the Organic Laws of the Several States provide is, that Trial by Jury shall continue as it stood when they were framed. — The Right is specifically guaranteed in Criminal Cases by the Constitutions of the Several States, but agreeably to the View taken in Pennsylvania, may be withheld in creating a New Offence. — A Preliminary Finding by the Grand Jury is indispensable in the Federal Courts under the Fifth Amendment, but is not secured in the States by the Fourteenth. — The Right of a Jury Trial in Civil Cases depends in general on the English Law as it was brought to this Country and adopted here. — Proceedings in Chancery and the Admiralty, For a Divorce, and Under the Right of Eminent Domain, ordinarily take place without a Jury; and so of Contempts of Court and the Assessment of Taxes. — Cases may be decided summarily by a Justice of the Peace or Commissioner if there is an unclogged Right of Appeal to a Court and Jury. — Can a Judgment against a Servant, Surety, or Corporation be made conclusive on the Master, Principal Debtor, or Corporators?

It results from the principles and decisions already cited that under our organic laws no man can be deprived of life or liberty, or of any right which is in the nature of property except in the exercise of the police power or through a judgment, decree, or sentence rendered with actual or constructive notice, and a reasonable opportunity for a hearing by some duly constituted tribunal having jurisdiction of the cause and the parties;¹ and if any one of these requisites is wanting, the entire proceeding and all that is done under it will be void. An act of Congress or of a State legislature declaring that the title to land is not in A, or assuming to take it from him for a public use without, or for a private

¹ *Pennoyer v. Neff*, 96 U. S. 714; *Kilbourn v. Thompson*, 103 Id. 168; *Richards v. Rote*, 68 Id. 218.

use with, compensation, is consequently invalid; and if it is carried into effect by the President or a governor, an ejectment may be maintained against the agents whom he employs.¹

If the proceeding is criminal, the case, speaking generally, must be submitted to a jury, and will depend on their verdict;² and the issues of fact in civil cases, with certain recognized exceptions, follow the same rule.³ A chancellor cannot be legislatively empowered to decide the title to goods or land unless the case falls under one or more of the heads of equitable jurisdiction as immemorially defined;⁴ and when the decision turns on whether there was actual fraud in a sale or conveyance, an issue must be framed in Massachusetts and submitted to a jury.⁵ So the right to use the public highways, including navigable streams, is in the nature of property, and a statute providing that the damages for its obstruction shall be assessed by arbitrators or referees instead of a court and jury in the ordinary course of the common law is invalid.⁶

The right of trial by jury depends upon the provisions by which it is specifically secured⁷ rather than on the phrase "due process of law," embodied in the Fifth and Fourteenth Amendments; and as this is the only clause in the national Constitution bearing on the subject which is applicable to the States, they are free to adopt any mode of procedure which is consonant with the principles of jurisprudence and

¹ *Davidson v. New Orleans*, 96 U. S. 97, 102; *United States v. Lee*, 106 Id. 196, 218; *Dale v. Medcalf*, 9 Pa. 108; *Menges v. Dentler*, 33 Id. 495.

² See *Jones v. Robbins*, 8 Gray, 329; *Nolan's Case*, 122 Mass. 330, 332; *Commonwealth v. Horregan*, 127 Id. 450; *Cancemi v. The State*, 18 N. Y. 128, 135.

³ *Haines's Appeal*, 73 Pa. 169; *Talmes v. Marsh*, 67 Id. 507; *Haines v. Levin*, 51 Id. 412. In criminal cases the right to a trial by jury cannot be waived, nor can the accused consent that the jurors shall be fewer in number than the customary twelve, *Cancemi v. The State*, 18 N. Y. 128, 135, unless he is explicitly authorized to do so by statute. *Murphy v. The State*, 97 Ind. 579.

⁴ *Haines's Appeal*, 73 Pa. 169.

⁶ *Rhines v. Clark*, 51 Pa. 96.

⁵ *Powers v. Raymond*, 137 Mass. 483.

⁷ See Note at close of Lecture.

calculated to promote the ends of distributive justice.¹ The federal guaranty is confined to the national courts, and does not preclude the States from authorizing their tribunals to decide civil or even criminal issues without submitting them to a jury.²

What the organic laws of the Union and the several States contemplate and are designed to secure is that trial by jury shall remain as it stood in England and this country at the declaration of independence,³ and down to the period when they were adopted. Their object is conservative, — to maintain the existing status, and not to lay down a universal and unbending rule which must be followed under circumstances for which the common law affords no precedent, or to preclude such reforms as may in the course of time be found advisable for the preservation of order and the administration of justice.⁴ Such, at least, is the interpretation given by the Supreme Court of the United States to the famous clause embodied in the Fourteenth and Fifteenth Amendments, which guarantees due process of law;⁵ and it has been put

¹ *Kalloch v. Superior Court*, 56 Cal. 229; *Rowan v. The State*, 30 Wis. 129; *Walker v. Sauvinet*, 92 U. S. 90; *Missouri v. Lewis*, 101 Id. 22; *Hurtado v. California*, 110 Id. 516, 527, 534, 548; *Bank of Columbia v. Okley*, 4 Wheaton, 235, 244.

² *Edwards v. Elliot*, 21 Wallace, 557; *Pearson v. Yewdall*, 95 U. S. 294; *Davidson v. New Orleans*, 96 Id. 105; *Hurtado v. California*, 110 Id. 516, 528, 531. See *ante*, p. 511.

³ *Anderson v. Caldwell*, 91 Ind. 454; *Van Swartow v. The Commonwealth*, 24 Pa. 131; *McKinney v. Monongahela Nav. Co.*, 14 Id. 65.

⁴ *Haines v. Levin*, 51 Pa. 414; *Wynkoop v. Cooch*, 89 Id. 451; *Ex parte Woorten*, 62 Mass. 174.

⁵ When "ample provision is made for an inquiry as to damages before a competent court and for a review of the proceedings of the court of original jurisdiction upon appeal to the highest court of the State, this is due process of law within the meaning of that term as used in the Federal Constitution," *Pearson v. Yewdall*, 95 U. S. 294, 296, or, as has been said and reiterated, "it is not possible to hold that a party has without due process of law been deprived of his property when, as regards the issues affecting it, he has, by the laws of the State, had a fair trial in a court of justice according to the modes of proceeding applicable to such a case." *Kennard v. Morgan*, 92 U. S. 480; *M'Millan v. Anderson*, 95 Id. 37; *Davidson v. New Orleans*, 96 Id. 105.

in some instances on the specific clauses in the Constitutions of the States.

The argument has been carried in Pennsylvania to the extent of deciding that the legislature may, in creating a new offence, withhold the guaranties which would be indispensable if it were old, and deny the accused the benefit of a trial by jury because the case does not fall within the line of the common law. In *Van Swartow v. The Commonwealth*,¹ an act of assembly rendering the sale of spirituous liquors on Sunday penal on conviction before a justice of the peace, was sustained on the ground that "every class of cases triable by jury in 1790 was still triable in no other way, or at all events the statute did not render them less numerous."²

We have here an entering wedge which may have dangerous consequences. Were "incivism," or, as we should now say, "disloyalty," made criminal in Pennsylvania, as it was in 1793 in France, the accused might be brought before a tribunal sitting only to convict, like that which sat in Paris during the Reign of Terror, and sentenced to death without a

¹ 24 Pa. 131.

² "There is nothing to forbid the legislature from creating a new offence and prescribing what mode they please of ascertaining the guilt of those who are charged with it; many tribunals unknown to the framers of the Constitution, and not at all resembling a jury, have been erected and charged with a determination of grave and weighty matters. For instance, commissioners, viewers, and appraisers of damages, county and township auditors, and those officers of the State Government whose duty it is to settle the public accounts, — all of these functionaries have at different times in our history been empowered to decide the most important controversies without appeal. In some of them the right of an ultimate trial by jury has been given, but this was not done because the laws were believed to be unconstitutional without it. The purpose of the Constitution undoubtedly was to preserve the jury trial whenever the common law gave it, and in all other cases to let the legislature and the people do as their wisdom and experience might dictate. Summary convictions were well known before the formation of the Constitution, and they are not expressly or impliedly prohibited by that instrument except in so far as they are not to be substituted for a jury where the latter mode of trial had been previously established." *Van Swartow v. The Commonwealth*, 24 Pa. 131.

hearing before a jury drawn from the mass of the community, which might contain some persons who would be impartial.¹

Whether and how far due process of law includes trial by jury has been elaborately considered in several recent instances, where it arose out of statutes authorizing prosecutions for murder and other felonies, on an information filed by the attorney-general without a presentment or the finding of a true bill by a grand jury. And the difference of opinion among the courts and judges is such that the debate can hardly be considered as closed.

In *Jones v. Robbins*,² the right to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial, before a probable cause is established by the finding of a true bill by a grand jury, was said to be implied in the requirement of due process of law, and declared one of the privileges and immunities of English law, and a security to the innocent against hasty, malicious, and oppressive prosecutions.

The Fifth Amendment puts the point beyond dispute in the federal tribunals, by coupling the provision for due process with a declaration that no person shall be held to answer a capital or otherwise infamous crime unless on a presentment of a grand jury.³ When, however, the question arose in *Hurtado v. California*,⁴ on an appeal from a State court, under the clause of the Fourteenth Amendment forbidding deprivation without due process of law, the English authorities were referred to as showing that misdemeanors might be prosecuted on an information filed by the attorney-general without bringing the case before a grand jury. If this exception did not extend to felonies at common law, it must be remembered that the Constitution of the United States "was framed for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues." The phrase "due process of law" should consequently receive a comprehensive interpretation, and no procedure be treated as unconstitutional "which makes due provision for the trial

¹ See *post*, p. 886.

² *Ex parte Bain*, 121 U. S. 1. See *ante*, p. 510.

³ 8 Gray, 329.

⁴ 110 U. S. 516.

of the criminal before a court of competent jurisdiction, for bringing the party against whom the proceeding is had into court, and notifying him of the case he is required to meet, for giving him an opportunity to be heard in his defence; for the deliberation or judgment of the court, and for an appeal from that judgment to the highest tribunal of the State for hearing and judgment there."¹ It might well be that whatever the common law tolerated should be regarded as due process of law, but it did not follow that methods which were unknown to that law might not be adopted if they were consistent with the cardinal principles which are essential to the administration of justice.² It followed that a prosecution, trial, and conviction for murder, on information, after examination and commitment by a magistrate, was due process of law within the meaning of the Fourteenth Amendment.

If, as this somewhat latitudinarian interpretation teaches, process may vary from the course of the common law without ceasing to be due so long as it conforms to the canons of general jurisprudence, the Fourteenth Amendment gives no right to a jury which the States need observe either before arraignment, or subsequently when the accused is put on trial, and the right not to be twice put in jeopardy for the same offence, or be compelled to testify against one's self in a criminal case, is equally at large.³ In interpreting this clause of the Constitution it should be remembered that due process of law is equivalent to the judgment of his peers or law of the land of Magna Charta.⁴ The *judicium parium suorum* was not, as the majority of the court in *Hurtado v. California*⁵ would seem to have supposed, a right only of the barons, because the guaranty included every freeman, and the yeoman was not less entitled to the verdict of his equals

¹ *Hurtado v. California*, 110 U. S. 516; *Kennard v. Louisiana*, 92 Id. 480; *Davidson v. New Orleans*, 96 Id. 97, 99; *Foster v. Kansas*, 112 Id. 201, 206.

² *Hurtado v. California*, 110 U. S. 516, 528, 531.

³ See *Hurtado v. California*, 110 U. S. 516, 547.

⁴ *Mayo v. Wilson*, 1 N. H. 53, 55; *The State v. Ray*, 63 Id. 406; 2 *Institutes*, 50; *Palaiet's Appeal*, 67 Pa. 479. See *ante*, p. 749.

⁵ 110 U. S. 516, 529.

than the peer.¹ Such is the view taken in New Hampshire and Massachusetts, where the stipulation that no man shall be "deprived" except by the law of the land or the judgment of his peers, or their equivalent "due process of law," is held to guarantee the right of trial by jury as it existed when the venerable clause of Magna Charta was embodied in our organic laws.²

¹ 2 Inst. 46; Kent's Com. 13, 552; *Hurtado v. California*, 110 U. S. 516, 543.

² See *The State v. Ray*, 63 N. H. 406; *Jones v. Robbins*, 8 Gray, 329, 343; *Saco v. Wentworth*, 37 Me. 165, 172.

This side of the question is strongly put in the following extract from the dissenting opinion of Harlan, J., in *Hurtado v. California*, 110 U. S. 516, 553: "It is said by the court that the Constitution of the United States was made for an undefined and expanding future, and that its requirements of due process of law in proceedings involving life, liberty, and property must be so interpreted as not to deny to the law the capacity of progress and improvement; that the greatest security for the fundamental principles of justice resides in the right of the people to make their own laws and alter them at pleasure. It is difficult, however, to perceive anything in the system of prosecuting human beings for their lives by information which suggests that the State which adopts it has entered upon an era of progress and improvement in the law of criminal procedure. Even the statute of Henry VII. c. 3, allowing informations, and under which Empson and Dudley and an arbitrary Star Chamber fashioned the proceedings of the law with a thousand tyrannical forms, expressly declared that it should not extend to treason, murder, or felony, or to any other offence wherefor any person should lose life or member. See 2 Institutes, 51. So great, however, were the outrages perpetrated by those men that this statute was repealed by 1 Henry VIII. c. 6. Under the local statutes in question, even the district-attorney of the county is deprived of any discretion in the premises; for if in the judgment of the magistrate before whom the accused is brought, — and generally he is only a justice of the peace, — a public offence has been committed, it becomes the duty of the district-attorney to proceed against him by information for the offence indicated by the committing magistrate. Thus in California nothing stands between the citizen and prosecution for his life, except the judgment of a justice of the peace. Had such a system prevailed in England in respect of all grades of public offences, the patriotic men who laid the foundation of our government would not have been so persistent in claiming as the inheritance of the colonists the institutions and guaranties which had been established by her fundamental laws for the protection of the rights of life, liberty, and property. The Royal Gov-

Where, as in the federal courts under the Fifth Amendment, a presentment or the finding of a true bill is essential to the institution of a criminal proceeding, the court cannot by amending the indictment substitute a different charge for that which has received the sanction of the grand jury;¹ and it has been held in some instances, and recently by the Supreme Court of the United States, that the rule is unbending, and forbids any change, however trivial, without reassembling the grand jury and obtaining their consent.² A different view prevails in New York and Pennsylvania, where legislative

error of New York would not have had occasion to write, in 1687, to the Home Government, that the members of the Provincial Legislature were 'big with the privileges of Englishmen and Magna Charta.' 3 Bancroft, 56. Nor would the Colonial Congress of 1774, speaking for the people of twelve colonies, have permitted, as they did, the journal of their proceedings to be published with a medallion on the title-page 'representing Magna Charta as the pedestal on which was raised the column and cap of liberty, supported by twelve hands, and containing the words: *Hunc tuemur, hoc nitimur.*' Hurd on Habeas Corpus, 108. Anglo-Saxon liberty would perhaps have perished long before the adoption of our Constitution, had it been in the power of government to put the subject on trial for his life whenever a justice of the peace, holding his office at the will of the Crown, should certify that he had committed a capital crime. That such officers are in some of the States elected by the people, does not add to the protection of the citizen; for one of the peculiar benefits of the grand jury system, as it exists in this country and England, is that it is composed, as a general rule, of a body of private persons who do not hold office at the will of the government or at the will of voters. In many, if not in all of the States, civil officers are disqualified to sit on grand juries. In the secrecy of the investigations by grand juries, the weak and helpless, proscribed perhaps because of their race, or pursued by an unreasoning public clamor, have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies. 'Grand juries perform,' says Story, 'most important public functions, and are a great security to the citizens against vindictive prosecutions, either by the government or by political partisans, or by private enemies.' Story's Const., section 1785."

¹ Commonwealth v. Child, 13 Pick. 198; Commonwealth v. Mahar, 16 Id. 120; State v. Sexton, 8 Hawkes (N. C.), 184.

² Ex parte Bain, 121 U. S. 1; Commonwealth v. Drew, 3 Cush. 279.

enactments authorizing formal amendments not affecting the substance of the charge,—as, for instance, by altering the name of the owner of the property alleged to have been stolen,—are viewed as constitutional;¹ and it is customary in Pennsylvania in receiving the bill from the grand jury to ask whether they agree that the court may make formal changes touching no matter of substance.

When the right to a trial by jury exists in civil cases, cannot readily be defined, but may be gathered from the practice of the English and American courts before and at the period when the Constitution was adopted. The colonists were English by descent, and their object in breaking the tie with the mother-country and forming a government of their own was to secure for their adopted land the rights and privileges which their forefathers struggled for, and they deemed essential to freedom;² and what the English race on either side of the Atlantic generally accepted, may be taken as a guide in interpreting the Constitution where it is not explicit and makes use of phrases borrowed from the common law.³ When, therefore, it appears that questions of the kind involved were summarily determined under the law of England after Magna Charta and as it was brought to this country and acted on here, it is not necessarily an objection that a jury was not empanelled, or that the persons by whom the cause was decided were not learned in the law and did not constitute or act as a court in the ordinary acceptance of the term.⁴ Such an inference may be drawn from the terms

¹ *People v. Johnson*, 104 N. Y. 213, 216.

² See *Hurtado v. California*, 110 U. S. 516, 552, 554; *Anderson v. Caldwell*, 91 Ind. 451.

³ *Munn v. Illinois*, 94 U. S. 113; *Boyd v. The United States*, 116 Id. 616; *Jones v. Robbins*, 8 Gray, 329.

⁴ *The State v. Lewis*, 51 Conn. 114; *Murray v. Hoboken Land Co.*, 18 Howard, 275; *Kelly v. Pittsburg*, 104 U. S. 79; *New Orleans v. Davidson*, 96 Id. 97; *Seeley v. Bridgeport*, 53 Conn. 1; *Heacock v. Hosmer*, 109 Ill. 215; *Flaherty v. McCormick*, 113 Id. 538; *Biddle v. The Commonwealth*, 13 S. & R. 408; *Emerick v. Harris*, 1 Binney, 416; *Norton v. McLeary*, 8 Ohio St. 209; *Sullivan v. Adams*, 1 Gray, 476; *Commonwealth v. Whitney*, 108 Mass. 5.

employed in the Federal Constitution and the organic laws of the several States, which are: "The right of trial by jury shall be preserved;" "Shall be as heretofore;" "Shall remain inviolate,"—indicating that the purpose was not to extend the right, but to forbid any change which would circumscribe it. "The great purpose of the Constitution in providing that trial by jury shall be as heretofore, was not to contract the power to furnish modes of civil procedure in courts of justice, but to secure the right of trial by jury in its accustomed form before rights of persons or property shall be finally decided. Hence the right of trial as it then existed was secured, and the trial itself protected from innovations which might destroy its efficiency as a palladium of the liberties of the citizens. Beyond this point there is no limitation upon legislative power in providing modes of redress for civil wrongs and regulating their provisions."¹

In many of the above instances the statute gave a right of appeal which would lead to a trial by jury; and but for this circumstance the summary proceeding might have been held unconstitutional.² Though justices of the peace and judges cannot be substituted for the time-honored and customary tribunal of twelve men taken from the body of the county, it has yet been held that if there is an unclogged and unfettered right of appeal to a court where the citizen can have the benefit of a jury, his constitutional right is not impaired.³ A clog on the right of appeal may, agreeably to the same authorities, be equivalent to a denial;⁴ and such will be the effect of requiring a kind or amount of security which the appellant cannot reasonably be expected to give.⁵ The weight of authority seems to be that exacting an oath that the appellant has a just defence or cause of action, or requiring

¹ *Haines v. Levin*, 51 Pa. 414; *Wynkoop v. Cooch*, 89 Id. 451.

² *Jones v. Robbins*, 8 Gray, 329, 341; *Butler v. Worcester*, 112 Mass. 441, 556; *Emerick v. Harris*, 1 Binney, 416; *Norton v. McLeary*, 8 Ohio St. 205, 209; *Lamb v. Lane*, 4 Id. 167; *Gaston v. Babcock*, 8 Wis. 503.

³ *Sullivan v. Adams*, 1 Gray, 476; *Beers v. Beers*, 4 Conn. 535.

⁴ *Jones v. Robbins*, 8 Gray, 329, 343; *Saco v. Wentworth*, 37 Me. 165, 172; *Plimpton v. Somerset*, 33 Vt. 283.

⁵ See *Reckner v. Warner*, 22 Ohio St. 275.

him to give bail for the payment of costs if unsuccessful, will not contravene the constitutional prohibition. In *Biddle v. Commonwealth*¹ and in *Haines v. Levin*² the court held that the legislature might, in giving an appeal from a proceeding before justices of the peace against a tenant, provide that it should not be a supersedeas, though the effect was to eject him summarily without a jury trial or a day in court. A statute requiring the defendant in a criminal proceeding to deny the charge under oath, in order to avoid a forfeiture or obtain a jury trial, is manifestly unconstitutional, as denying the accused the benefit of the presumption in favor of innocence, and compelling him to give evidence which may militate against himself. Such an enactment would be *ex post facto* relatively to past offences, but is also contrary to the amendments which prohibit "deprivation," without due process, for any cause, past or future.³

The power of a chancellor to determine questions of fact arising in the course of equitable jurisdiction dates almost as far back as Magna Charta, and there is nothing in the national or organic State laws to forbid its exercise where the case is in other respects within his jurisdiction.⁴ But it is also true conversely that the usage which confers the power prescribes its bounds, and that the legislature cannot authorize a tribunal acting without a jury to determine rights of property unless there is some equitable ground of relief.⁵

Questions arising on a *quo warranto* follow a like rule, and

¹ 13 S. & R. 405. See *Custis v. Gill*, 34 Conn. 49.

² 51 Pa. 414.

³ *Wynehamer v. The People*, 13 N. Y. 378, 444. See *ante*, p. 776.

⁴ *Heacock v. Hosmer*, 109 Ill. 245; *Fletcher v. McCormick*, 115 Id. 538, 543; *Burt v. Harrah*, 65 Iowa, 643; *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. 408; *Norris's Appeal*, 64 Id. 275; *Tilmes v. Marsh*, 67 Id. 507; *Haines's Appeal*, 73 Id. 169; *Matter of the Empire City Bank*, 18 N. Y. 119, 121.

⁵ *Haines's Appeal*, 73 Pa. 169, 171. Agreeably to the Massachusetts cases, the parties to a suit in equity are entitled to a jury trial of all facts that are properly within the scope of a court of common law. *Franklin v. Green*, 2 Allen, 519; *Stockbridge Iron Co. v. Hudson Iron Co.*, 102 Mass. 45, 47; *Powers v. Raymond*, 137 Id. 483.

may, unless otherwise regulated by statute, be decided by the judges as regards both the law and the facts.¹ And such also is the case as regards admiralty jurisdiction, even where it is extended to controversies which were not originally within its scope.²

The right to convict and punish for a contempt is with still more reason vested in the court against which the offence is committed, as being essential to the administration of justice, and one that could not be effectually exercised if the judges had to impanel twelve men and allow them to say whether the accused had erred.³

Proceedings to ascertain the amount of compensation due for property taken for public use are in the nature of an arbitration or appraisal rather than a suit, and must be prosecuted, if the legislature so ordain, before a statutory tribunal without impanelling a jury, — a rule which includes the assessment of the damages and benefits resulting from the opening of a road or laying a railway track.⁴

¹ *Ames v. Kansas*, 111 U. S. 449; *Foster v. Kansas*, 112 Id. 201; *State v. Lewis*, 51 Conn. 114; *Ligat v. The Commonwealth*, 19 Pa. 456, 460; *Clark v. Miller*, 54 N. Y. 528; *Cook v. South Park*, 61 Ill. 115; *Rich v. Chicago*, 59 Id. 286; *Lamb v. Lane*, 4 Ohio St. 167; *Connecticut River R. R. Co. v. Commissioners*, 127 Mass. 50.

² *Sheppard v. Steele*, 43 N. Y. 52, 57; *Edwards v. Elliott*, 36 N. J. Law, 419, 516; *Insurance Co. v. Dunham*, 11 Wallace, 1.

³ *Ex parte Wall*, 107 U. S. 265.

⁴ *Butler v. Worcester*, 112 Mass. 541, 556; *Anderson v. Caldwell*, 91 Ind. 454; *Lipes v. Hand*, 104 Id. 103; *Cramer v. Cleveland R. R. Co.*, 5 Ohio St. 140, 145; *McKinney v. Monongahela Navigation Co.*, 14 Pa. 65; *Pennsylvania R. R. Co. v. Lutheran Congregation*, 53 Id. 445.

“The right which the Constitution declares shall remain inviolate is the right to trial by jury as it existed when that instrument was adopted. The right so carefully guarded and preserved is the one transmitted to us from our British ancestors. The right meant by our Constitution is the great one which has occupied such a prominent place both in law and in history. We are therefore to look to the common law to ascertain what this right was, and not to particular statutes, which may be changed at the pleasure of the legislature. The legislature neither created nor preserved this right, although they have often declared it. It exists without legislation. The British Constitution does not limit the power of Parliament in the exercise of the right of eminent domain, and that body has

The constitutional requirements are satisfied in this and other instances of a like kind when a competent tribunal is

power to direct the seizure of private property for public use without compensation. It is true that the British statutes have, in almost every instance, required compensation; but the right to compensation was a purely statutory one, and enforceable only under the provisions of the statute. Our own cases, and indeed the American cases generally, treat the proceedings as special statutory ones; and in this they were clearly right, for at common law the proceedings were of purely statutory origin, and they are none the less so under our Constitution. The legislature is not invested by the Constitution with a new right, that of eminent domain, for that is an inherent right of sovereignty. On the contrary, the right is restricted, not enlarged, by the Constitution. If it were not for the constitutional limitation, property might be seized without paying its owner any compensation. The right, therefore, did not exist before the Constitution, and is a right to be exercised by the legislature in the enactment of statutes providing the mode of procedure. In short, the mode of proceeding is within legislative control, limited only by the provisions of the Constitution."

In *Pennsylvania R. R. Co. v. Lutheran Congregation*, 53 Pa. 445, the question came before the court in proceedings instituted by the railroad company to condemn lands for a right of way, and the court held that the mode of proceeding was entirely within the control of the legislature, and said: "Indeed the right of trial by jury has never been held to belong to the citizen himself in proceedings by the State under her powers of eminent domain. *McKinney v. Monongahela Navigation Co.*, 14 Pa. 65. In speaking of the point made that the act violated the Constitution, the court said: 'The answer to that is, that an appeal to a jury is not a matter of right. The provision in our Constitution (Art. I. sect. 7) that the right of trial by jury shall remain inviolate, does not interfere with such modes of ascertaining damages for lands taken by eminent domain as the legislature could provide before its adoption.' In the recent case of *Kendall v. Post*, 8 Oregon, 141, it was said of the constitutional provision we are discussing, that 'This constitutional provision does not apply to cases of taking private property for public uses, but to actions in courts of justice.' To this effect runs the great current of judicial opinion. *Livingston v. Mayor, etc.*, 8 Wend. 85; *Beekman v. Saratoga, etc.*, R. R. Co., 3 Paige. 45; *Heyneman v. Blake*, 19 Cal. 579; *Buffalo, etc., R. R. Co. v. Ferris*, 26 Texas, 588; *City of Des Moines v. Layman*, 21 Iowa, 153; *Backus v. Lebanon*, 11 N. H. 19; *Rich v. City of Chicago*, 59 Ill. 286; *Ames v. Lake Superior, etc.*, R. R. Co., 21 Minn. 241; *Anderson v. Caldwell*, 91 Ind. 454."

This opinion seems to be a sound exposition of the law, except in implying that if there were no specific restraint, property might be taken for

provided, proceeding with notice, before which the parties may appear and have a hearing, and the payment of any sum which may be awarded for damages is charged upon the public treasury of the State or a town or county.¹

It is not less well settled that taxes which may amount to thousands of dollars, and be summarily collected if unpaid, may be assessed without notifying the owner, if he has an opportunity to appeal and contest the charge before some duly constituted tribunal; and the objection that this is not due process of law may be met with the reply that taxes have not as a general rule in this country since the declaration of independence, nor in England before that time, been collected by regular judicial proceedings.² But it is true in this as in every instance where rights of property are involved, that before the liability of the taxpayer is finally determined, he must have some kind of notice of the proceeding and an opportunity to be heard with reference to the value of his property and the amount of the charge.³

In *Wurtz v. Hoagland* ⁴ the principle was held broad enough to cover the proceedings of commissioners chosen in pursuance of a statute by a majority in number and value of the owners of marshland to devise a plan of drainage and apportion the cost among the parties interested, according to

public use, notwithstanding the clause prohibiting that deprivation, without due process of law. Whatever Magna Charta forbade the king is also as regards life, property, and liberty forbidden to the General Government and the States by the Fifth and Fourteenth Amendments; and it is inconceivable that the barons meant to give John a latitude which would have rendered every estate in England insecure.

¹ *Bloodgood v. The M. & H. R. R. Co.*, 18 Wend. 9; *Bruggerman v. True*, 25 Minn. 123.

² *Kelly v. Pittsburg*, 104 U. S. 79; *McMillan v. Anderson*, 95 Id. 37; *Howe v. Cambridge*, 114 Mass. 391.

³ In the *Matter of McPherson*, 104 N. Y. 306, 321; *Stuart v. Palmer*, 74 Id. 183; *Longford v. The Commissioners*, 16 Me. 375; *Philadelphia v. Scott*, 81 Pa. 80; *Baltimore & Ohio R. R. Co. v. Wagner*, 43 Ohio, 75; *Jackson v. State*, 103 Ind. 480; *Wright v. Wilson*, 95 Id. 408; *Bixby v. Goss*, 54 Mich. 551; 1 Smith's Lead. Cas. (8 Am. ed.) pp. 1136-1140. See *ante*, pp. 312, 314.

⁴ 114 U. S. 608, 614.

their respective shares. As the statute was applicable to all lands of the same kind, and no person could be assessed under it without notice and an opportunity of being heard, the plaintiffs in error had neither been denied the equal protection of the laws, nor deprived of their property without due process of law within the meaning of the Fourteenth Amendment.¹ Such also is the course of decision in New Jersey, Indiana,² Illinois, and other States where the nature and configuration of the soil render drainage so essential to health and agriculture that it may be enforced and the cost and benefits assessed under the police power or the right of eminent domain, by commissioners appointed for that purpose, without a trial by jury or an appeal to the courts.³

As the foregoing remarks indicate, questions of great moment, including those arising out of divorce,⁴ insanity, habitual drunkenness, the assessment of taxes, and the right to compensation for property taken for public use may, if the legislature think fit and they are not regulated by the organic law, be decided without a jury by tribunals which do not follow the course of the common law.⁵ Nothing can well more intimately affect the citizen, short of a charge of crime, than an allegation that he is, from habitual drunkenness or insanity, unfit to be at large or to take charge of his estate; and yet such questions, including the appointment of a guardian of the person and property of the drunkard or lunatic, may be submitted in some of the States to persons specifically appointed by the courts, although the Constitution provides that the right to a

¹ *Barbier v. Connelly*, 113 U. S. 27; *Walker v. Sauvinet*, 92 Id. 90; *Davidson v. New Orleans*, 96 Id. 97; *Hagar v. Reclamation District*, 111 Id. 701.

² *The Tide-Water Co. v. Coster*, 3 C. E. Green, 531; *State v. Blake*, 36 N. J. Law, 442, 447; *Lipes v. Hand*, 104 Ind. 503; *Indianapolis Gravel Road v. The State*, 105 Id. 37; *Huston v. Clark*, 112 Ill. 344. See *ante*, p. 287.

³ *Moranda v. Spurlin*, 100 Ind. 380; *Herick v. Vorglet*, 110 Id. 279, 286; *Rutherford v. Maynes*, 97 Pa. 78, 83; *Brewer v. Springfield*, 97 Mass. 152; *People v. Nearing*, 27 N. Y. 309.

⁴ *Cassidy v. Sullivan*, 64 Cal. 266.

⁵ *Willyard v. Hamilton*, 7 Ohio St. 111; *Craymon v. Railroad Co.*, 5 Id. 140, 145; *Butler v. Worcester*, 112 Mass. 441, 516.

jury shall remain inviolate,¹—the reason assigned being that the word “remain” indicates that the intention was that whatever custom had established, should stand.

The weight of authority is that whatever the rule may be under the organic provisions which specifically confer the right to a jury trial, it is not essential to the due process guaranteed by the Fifth and Fourteenth Amendments. In *Ex parte Wall*² the argument for the appellant was that a summary proceeding against an attorney to exclude him from the practice of his profession on account of acts for which he may be indicted and tried by a jury, is in violation of the Fifth Amendment of the Constitution, which forbids the deprivation of life, liberty, or property without due process of law. But this contention was overruled on the ground that the action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding, practised from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary decision of the court of which he is an attorney. The extent of the jurisdiction is a subject of fair judicial consideration. That it embraces many cases in which the offence is indictable, is established by an overwhelming weight of authority. This being so, the question whether a particular class of cases of misconduct is within its scope, cannot involve any constitutional principle.³

¹ *Hagan v. Cohen*, 29 Ohio, 83 ; *Gaston v. Babcock*, 8 Wis. 503.

² 107 U. S. 265.

³ “It is a mistaken idea that due process of law requires a plenary suit and a trial by jury in all cases where property or personal rights are involved. The important right of personal liberty is generally determined by a single judge, on a writ of habeas corpus, using affidavits or depositions for proofs where facts are to be established. Assessments for damages and benefits occasioned by public improvements are usually made by commissioners in a summary way.

“Conflicting claims of creditors, amounting to thousands of dollars, are often settled by the courts on affidavits or depositions alone ; and

It results from this decision not only that a trial by jury is customarily dispensed with in numerous instances where rights of property are involved, but that due process of law does not require that the law shall be administered in all cases by a court of record, or judges set apart for the purpose and holding office for life or a definite term of years.¹ Such a rule would be incompatible with the promptitude

the courts of chancery, bankruptcy, probate, and admiralty administer immense fields of jurisdiction without trial by jury. In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case and sanctioned by the established customs and usages of the courts. 'Perhaps no definition,' says Judge Cooley, 'is more often quoted than that given by Mr. Webster in the Dartmouth College Case: "By the law of the land is most clearly intended the general law,—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society.' Cooley's Const. Lim. 353.

"The question, What constitutes due process of law within the meaning of the Constitution? was much considered by this court in *Davidson v. New Orleans*, 96 U. S. 97; and Mr. Justice Miller, speaking for the court, said: 'It is not possible to hold that a party has without due process of law been deprived of his property when as regards the issues affecting it he has by the laws of the State had a fair trial in a court of justice according to the modes of proceeding applicable to such a case.' And referring to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 Howard, 272, he said, 'An exhaustive judicial inquiry into the meaning of the words "due process of law" as found in the Fifth Amendment resulted in the unanimous decision of this court that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts.'

"We have seen that in the present case due notice was given to the petitioner, and a trial and hearing was had before the court in the manner in which proceedings against attorneys when the question is whether they should be struck off the roll are always conducted.

"We think that the court below did not exceed its powers in taking cognizance of the case in a summary way, and that no such irregularity occurred in the proceeding as to require this court to interpose by the writ of mandamus. The writ of mandamus is therefore refused." *Ex parte Wall*, 107 U. S. 265.

¹ See *Wurtz v. Hoagland*, 114 U. S. 614; *Murray v. The Hoboken Land Co.*, 18 Howard, 275.

which may be requisite for the effectual exercise of the police power; and hence nuisances may be abated and the cost imposed summarily on the owner of the property concerned, by commissioners or a board of health appointed by the governor or the courts.¹ But the statement must be taken with the qualification that no person can be deprived of his land or goods or subjected to a pecuniary liability without an adjudication and such notice and opportunity for a hearing or appeal as the nature of the case admits;² and if this safeguard can be dispensed with in any case, it must be on the ground of a necessity which does not admit of delay and transcends ordinary rules. A statute authorizing any one who found logs floating in the Susquehanna to bring them ashore and retain them as his own property unless they were claimed by the owner within two months, was pronounced invalid in *Craig v. Kline*,³ as imposing a forfeiture without due process of law. So an act authorizing the owner of land to seize and sell cattle found astray or trespassing on his ground, without notice to the person to whom they belong, or reasonable opportunity to pay the damages and redeem, is unconstitutional, and will not be an answer to an action brought to recover compensation for the wrong.⁴ For like reasons the legislature cannot provide that the commissioners named in the act may, on complaint made by any person interested that the embankments of a river are out of repair, forthwith notify the riparian owners to repair them in forty-eight hours, and if they fail to comply within the time aforesaid, do the work and enter the expense as a lien on the premises, because the language rather negatives than implies that the commissioners are to summon the parties interested and hear what they have to say.⁵

¹ 2 Pa. 366; *Easby v. The City of Philadelphia*, 67 Id. 337.

² *Stuart v. Palmer*, 74 N. Y. 188; *Philadelphia v. Scott*, 81 Pa. 81, 83, 90; *Craig v. Kline*, 65 Id. 399; *Moulton v. Parks*, 64 Cal. 166; *Easby v. The City of Philadelphia*, 67 Pa. 337, 341. See *Hurtado v. California*, 110 U. S. 516, 534; *Davidson v. New Orleans*, 92 Id. 97.

³ 65 Pa. 399.

⁴ *Rockville v. Nearing*, 35 N. Y. 302; *Dunn v. Burleigh*, 62 Me. 24.

⁵ See *Philadelphia v. Scott*, 81 Pa. 80, 90.

It is not less essential that the body by which a decision is pronounced which is judicial in its nature, in imposing a liability or affecting the title to land or goods, should observe the forms which are essential to certainty and for preventing misrepresentation and fraud. A judgment may be given orally, but will not become operative until it is reduced to writing and entered authentically of record or in some book or paper containing the minutes of the proceedings of the magistrates or commissioners who constitute the court. An order of the Board of Health for the abatement of a nuisance must consequently be written, and set forth clearly enough to show that a nuisance exists and endangers the health of the neighborhood;¹ and it was held that such an adjudication must be proved by the production of the minutes or a duly certified copy, as distinguished from parol evidence.²

The Board of Health was said to be a tribunal created by statute, clothed with large discretionary powers, and being a public body, its acts should be proved by the highest and best evidence which the nature of the case admits of. Every proceeding of a judicial character must be in writing. It is not to be presumed that minutes of their proceedings were not kept by such a body, or that the determinations which seriously affect the property of individuals were not reduced to writing, but rest in parol.

The right to a trial by jury in civil cases is limited to issues of fact; and when the facts are admitted by a demurrer to the evidence or pleadings, the court declares the law. And it has been held to follow that the legislature may empower the trial-judge to enter a compulsory nonsuit at the close of the plaintiff's case without the consent of counsel, which, though always given under such circumstances in England, might be withheld in Pennsylvania.³ "The complaint that the constitutional right of trial by jury had been violated, was made without due consideration. The province of a jury has

¹ *Philadelphia v. Scott*, 81 Pa. 80, 90; *Meeker v. Van Rensselaer*, 15 Wend. 397.

² *Meeker v. Van Rensselaer*, 15 Wend. 397.

³ *Wynkoop v. Cooch*, 89 Pa. 451; *Munn v. Pittsburg*, 40 Id. 364.

always been to determine facts. What is the law applicable to those facts, has always been a question for the court. In ordering the nonsuit, the court conceded all the facts which the jury could have found, and simply declared that under the law as applicable to them there was no liability on the part of the defendant."¹

The judiciary are nevertheless as much bound by the constitutional safeguard as the legislature; and while the court may at the close of the plaintiff's case enter a nonsuit or direct a verdict for the defendant on the ground that the evidence, with all the inferences that can justifiably be drawn from it, is insufficient to support a verdict for the plaintiff, it cannot adopt this course after the defendant has opened his case and adduced testimony for its support, consistently with the clause of the Seventh Amendment guaranteeing the right of trial by jury, which, as was declared in *Baylis v. The Travellers' Insurance Co.*² has always been jealously guarded by the Supreme Court of the United States.³

It may be regarded as an indication that the intervention of a jury tends on the whole to promote impartiality and prevent abuse that there is an increasing disposition to give the citizen the benefit of the constitutional tribunal of twelve men, who may be, and presumably are, free from official bias; and such is the rule in Pennsylvania and some of the other States with regard to proceedings in lunacy, divorce, and to ascertain the damages occasioned by the exercise of the right of eminent domain.

It seems to have been thought in some instances that a man may enter into a relation with other persons which will, according to long-established usage, not only render him answerable for their contracts and defaults, but operate wholly or in part as a waiver of his right to a day in court, and expose his property to be taken in execution without notice or a hearing, for their debts as ascertained by a judgment against

¹ *s. p.* *Randall v. The Baltimore & Ohio R. R. Co.*, 109 U. S. 478.

² 113 U. S. 316.

³ *Elmer v. Grymes*, 1 Peters, 469; *Castle v. Bullard*, 23 Howard, 172; *Hodges v. Easton*, 106 U. S. 408.

them or a settlement of their accounts. Such may be the relation if the legislature so provide, or under a customary rule, of master and servant, principal and surety, or of a municipal or private corporation to the corporators.¹

"Taking," said Curtis, J., in *Murray v. The Hoboken Land Co.*, "these two objections together, they raise the questions whether, under the Constitution of the United States, a collector of the customs from whom a balance of account has been found to be due by accounting officers of the treasury, designated for that purpose by law, can be deprived of his liberty or property in order to enforce payment of that balance without the exercise of the judicial power of the United States, and yet by due process of law within the meaning of those terms in the Constitution; and if so, then, secondly, whether the warrant in question was such due process of law? . . . Tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment, the proceedings authorized by the act of 1820 cannot be denied to be due process of law when applied to the ascertainment and recovery of balances due to the government from a collector of customs, unless there exists in the Constitution some other provision which restrains Congress from authorizing such proceedings. For though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings,² yet this is not universally true. There may be, and we have seen that there are, cases under the law of England after Magna Charta and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial." It followed

¹ See *Murray v. Hoboken Land Co.*, 18 Howard, 275; *Levic v. Norton*, 51 Conn. 464; *Eames v. Savage*, 77 Me. 271.

² 2 Inst. 47, 50; *Hoke v. Henderson*, 4 Dev. N. C. Rep. 15; *Taylor v. Porter*, 4 Hill, 146; *Van Zandt v. Waddel*, 2 Yerg. 260; *State Bank v. Cooper*, Id. 599; *Jones's Heirs v. Perry*, 10 Id. 59; *Green v. Briggs*, 1 Curtis, 311; *Huber v. Reily*, 58 Pa. 117.

that as such an accounting as took place in the case under consideration had from a remote period been deemed conclusive in England and the United States, there was an implied exception which every collector of the customs must be presumed to know and acquiesce in on taking office, and by which he and his sureties were consequently bound.¹

It may be inferred from this decision that a proceeding which is in accordance with the *lex terræ* or customary law may be valid although the defendant does not have notice or an opportunity to be heard, and that what has been done long and usually will be regarded as the law of the land even when it does not conform to the rules which ordinarily prevail in the administration of justice.² The summary seizure and sale of a tenant's goods for taxes due and unpaid by the landlord rests on this ground, which has also been held broad enough to uphold laws rendering a judgment against a chartered company conclusive of the amount due in a suit brought to charge the members individually, although leaving them free to show that they were not corporators, or that the debt has been paid.³

The principle is carried farther in New England, where a judgment against a municipal corporation may be enforced by a levy on the goods of any person indicated to the sheriff, without giving him an opportunity to show that he resides elsewhere and is not directly or indirectly liable for the debt.⁴ If such be the fact, he is no worse off, agreeably to the view taken in *Eames v. Savage*, than a man

¹ Although an express or implied undertaking to be answerable for the result of a judicial proceeding against a third person, or that the latter will do whatever is there adjudged, as in the case of a bail or replevin bond or of a warranty of title (1 American Lead. Cas., 5th ed., p. 135), is binding, and may render the judgment conclusive of the liability so assumed, no such obligation will arise from a contract of suretyship or guaranty unless it is expressed in terms, or the contract is customarily so understood and interpreted (2 Smith's Lead. Cas., 8th Am. ed., p. 958).

² *McMillan v. Anderson*, 95 U. S. 37; *Eames v. Savage*, 77 Me. 212, 221.

³ *Garrison v. Howe*, 17 N. Y. 458; *Bank v. Ibbotson*, 24 Wend. 473. See *Pollard v. Bailey*, 20 Wallace, 520, 524.

⁴ *Eames v. Savage*, 77 Me. 212, 214.

whose property is seized under a writ against another, and may, like him, obtain redress through a suit against the sheriff. "By the common law of Massachusetts and of other New England States, derived from immemorial usage, the estate of any inhabitant of a county, town, territorial parish, or school district, is liable to be taken on execution on a judgment against the corporation.¹ In this Commonwealth payment of such a judgment has never been compelled by mandamus against the corporation, as in other parts of the United States."²

¹ 5 Dane, Ab. 158; *Hawkes v. Kennebunk*, 7 Mass. 461, 468; *Chase v. Merrimack Bank*, 19 Pick. 564, 569; *Gaskill v. Dudley*, 6 Met. 546; *Beardsley v. Smith*, 16 Conn. 368.

² *Dillon on Mun. Corp.* (2d ed.), sections 446, 686; *Supervisors v. United States*, 4 Wallace, 435; *Hill v. Boston*, 122 Mass. 342, 352.

"The plaintiff was an inhabitant of the town of Embden, where he began suit, and recovered judgment against that town in this court. The execution upon that judgment was issued, and was levied upon the plaintiff's goods, pursuant to Rev. Sts. of 1871, c. 84, sect. 29, now Rev. Sts. c. 4, sect. 30, which expressly provides that executions against towns shall be issued on the goods and chattels of the inhabitants thereof, and shall be levied upon such goods and chattels. The plaintiff, however, claims that the statute is forbidden and made null by the last clause of Section 6 of the Maine Bill of Rights, which declares that a person accused shall not be 'deprived of his life, liberty, property, or privileges but by the judgment of his peers or by the law of the land,' and also by that clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States which declares that no State shall 'deprive any person of life, liberty, or property without due process of law.'

"The presumption is the other way, in favor of the validity of the statute; and it is a presumption of great strength. All the judges and writers agree upon this. Chief-Justice Marshall in *Fletcher v. Peck*, 6 Cranch, 87, says that to overturn this presumption the judges must be convinced, and the 'conviction must be clear and strong.' Judge Washington, in *Ogden v. Saunders*, 12 Wheat. 270, declared that if he rested his opinion on no other ground than a doubt, that alone would be a satisfactory indication of an opinion in favor of the constitutionality of a statute. Chief-Justice Mellen, in *Lunt's Case*, 6 Me. 413, said, 'The court will never pronounce a statute to be otherwise [than constitutional], unless in a case where the point is free from all doubt.' This strong presumption is to be constantly borne in mind in considering the question here presented.

"The statute itself in this case has existed for half a century, since Feb. 27, 1833; but it introduced no new principle or rule in the

Such a rule may have been just when the inhabitants of the New England towns were really self-governing, and met

jurisprudence of this State, it merely affirmed a well-known custom or law that had long before existed. The practice of bringing suits against a political division or municipal organization, and collecting the judgment from the individuals composing it, is believed to have existed in England and to have been brought thence to New England. Actions against 'the hundred' were known as far back as Edward I. (stat. 13, Edw. I. c. 2; 3 Comyn's Dig., Hundred, c. 2). As 'the hundred' had no property, except that of individuals, the judgments must have been collected from the individuals. In *Russell v. Men of Devon*, 2 T. R. 667, Lord Kenyon said that indictments against counties were sanctioned by the common law, that they would be levied on the men of the county. In *Attorney-General v. Exeter*, 2 Russ. 45, the chancellor said: 'If the fee farm was charged on the whole place called Exeter, he who was entitled to the rent might have demanded it from any one who had a part of or in the city, leaving the person who was thus called on to obtain contributions from the other inhabitants as best he could.' In New England the practice obtained from the earliest times, without any statute. 'About the year 1790 one Gatehill was imprisoned on an execution against the town of Marblehead for a debt the town owned.' 5 Dane's Ab., c. 143, art. 5, sections 10, 11, p. 158. Mr. Dane, as early as his Abridgment, said 'the practice was justified by immemorial usage' (Ibid.). Such an imprisonment so soon after the Revolution, when the principles of liberty were so freshly vindicated, would never have been permitted had it not then been a familiar practice. The practice has been regarded as settled law in Massachusetts, and has been repeatedly alluded to in the opinions of the courts as sanctioned by immemorial usage. *Riddle v. Proprietors on Merrimack River*, 7 Mass. 187; *Hawkes v. Kennebunk*, 7 Id. 463; *School District in Rumford v. Wood*, 13 Id. 198; *Brewer v. New Gloucester*, 14 Id. 216; *Marcy v. Clark*, 17 Id. 330, 335; *Merchants' Bank v. Cook*, 4 Pick. 414; *Chase v. Merrimack Bank*, 19 Id. 568; *Gaskill v. Dudley*, 6 Met. 546; *Hill v. Boston*, 122 Mass. 344. The constitutionality of the law does not seem to have been really questioned till the case of *Chase v. Bank*, 19 Pick. 568, as late as 1837, and its constitutionality was there said to be so well established as not to be an open question. The people of Maine, while a part of Massachusetts, were familiar with the law and the practice. The Maine courts have repeatedly recognized it as long established and as in harmony with the State Constitution. *Adams v. Wiscasset Bank*, 1 Me. 361; *Fernald v. Lewis*, 6 Id. 268; *Baileyville v. Lowell*, 20 Id. 178, 181; *Spencer v. Brighton*, 49 Id. 326; *Hayford v. Everett*, 68 Id. 507. Its constitutionality does not seem to have been questioned by the profession till *Shurtliff v. Wiscasset*, 74 Me. 130. In Connecticut also the antiquity and constitutionality

habitually to determine what expenditures were necessary for the common welfare, but is inapplicable now that they have grown into proportions which are incompatible with democratic government, and the citizens at the best only ratify nominations made for them by others. When the question arose in the Supreme Court of the United States that tribunal treated the New England doctrine as at variance with principles which are generally recognized in this country.¹ Assuming that the creditor is entitled to the payment of his judgment, and that the city neglects its duty in refusing to raise the amount by taxation, it does not follow that the courts may order the amount to be made up from the private estate of one of its citizens. Such "a summary proceeding would involve a violation of the rights of the latter. He has never been heard in court. He has had no opportunity to establish a defence to the debt itself, or, if the judgment is valid, to show that his property is not liable to its payment. It is well settled that legislative exemptions from taxation are valid, that such exemptions may be perpetual in their duration, and that they are, in some cases, beyond legislative interference. The proceeding supposed would violate the fundamental principle contained in chapter xxix. of Magna Charta and embodied in the Constitution of the United States, that no man shall be deprived of his property without due process of law; that is, he must be served with notice of the proceeding, and have a day in court to make his defence."²

In *Levick v. Norton*³ a statute rendering a recovery for

of the law have been repeatedly affirmed. *Beers v. Botsford*, 3 Day, 159; *Beardsley v. Smith*, 16 Conn. 368.

"That a statute or rule of law or custom has so long existed unquestioned, and has been so often invoked, and universally approved, and has become ingrained like this in the jurisprudence of a State, is a strong, if not conclusive, reason for pronouncing it constitutional and a part of the law of the land. *State v. Allen*, 2 McCord, 56; *Sears v. Cottrell*, 5 Mich. 251."

¹ *Reese v. The City of Watertown*, 19 Wallace, 107, 116; *Merriwether v. Garrett*, 102 U. S. 472, 515. See *ante*, p. 640.

² 19 Wallace, 122.

³ 51 Conn. 461.

an injury resulting from the defendant's negligence in driving a carriage, conclusive of the wrong done and the damages, in an action against a third person on proof that he was the owner of the carriage, unless he could show that the judgment was obtained fraudulently, was upheld, notwithstanding its injustice and the opening which it afforded for collusion. Such a result is hardly reconcilable with the constitutional requirement that no man shall be bound by that which he has no opportunity to controvert.¹

In *Levick v. Norton* the relation of master and servant was treated as analogous to that of principal and surety, and the court relied on the cases which hold that a judgment against an administrator concludes the sureties in his official bond.² The real ground of these decisions, however, is that such a bond is an undertaking that the administrator shall pay what he owes, as decreed by the court having jurisdiction of his accounts.³ They are not, therefore, applicable to ordinary contracts of suretyship,⁴ nor do they show that a judgment in tort against a servant can be conclusive on the master on general principles or under an act of assembly, unless it was done at the master's command, and then only as evidence of the damages in an action by the servant for indemnity.⁵

¹ See *Merriwether v. Garrett*, 472, 515.

² *Wiley v. Paulk*, 6 Conn. 74; *Heard v. Lodge*, 20 Pick. 53; *Commonwealth v. Gracey*, 96 Pa. 7; *Shepard v. Pebbles*, 58 Wis. 373; *Heard v. Mibshill*, 11 Gill. & J. 383.

³ 2 Smith's Lead. Cas. (8th Am. ed.) 958; 1 American Lead. Cas. (5th ed.) 13.

⁴ *Giltinan v. Strong*, 64 Pa. 242, 246; *Douglas v. Howland*, 24 Wend. 35.

⁵ See *Mason v. Strickland*, 17 S. & R. 354; *Giltinan v. Strong*, 64 Pa. 242, 247.

NOTE.

The following extract from Stimpson's American Statute Law gives the organic laws of the several States relating to trial by jury:—

IN CIVIL CASES.

"§ 72. **Trial by Jury.**¹ In twenty-seven States there is a general provision in the Constitution that the right to trial by jury shall remain

¹ "Founded on the Declaration of Independence and U. S. C. Amt. 7.

inviolable, — R. I. C. 1, 15; Ct. C. 1, 21; N. Y. C. 1, 2; N. J. C. 1, 7; Pa. C. 1, 6; O. C. 1, 5; Ill. C. 2, 5; Mich. C. 6, 27; Wis. C. 1, 5; Iowa C. 1, 9; Minn. C. 1, 4; Kan. C. (Bill of Rights) 5; Neb. C. 1, 6; Md. (Declaration of Rights) 5; Del. C. 1, 4; Ky. C. 13, 8; Tenn. C. 1, 6; Mo. C. 2, 28; Ark. C. 2, 7; Tex. C. 1, 15; Cal. C. 1, 7; Nev. C. 1, 3; S. C. C. 1, 11; Ga. C. 6, 18, 1; Ala. C. 1, 12; Miss. C. 1, 12; Fla. C. (Declaration of Rights) 8; N. M. 95, 1; 1851, July 12, § 12; Ariz. (Bill of Rights) 8.

“In three this provision applies only to civil cases, — Ind. C. 1, 20; W. Va. C. 3, 13; Ore. C. 1, 17. So, in five, only to controversies concerning property and suits between two or more persons (*i.e.* civil suits), — N. H. C. 1, 20; Mass. C. 1, 15; Me. C. 1, 20; Va. C. 1, 13; N. C. C. 1, 19. And in two it is provided that the right shall only in civil cases exist when an issue of fact proper for a jury is joined in a court of law, — Vt. C. 1, 12; Md. C. 15, 6.

“In Texas the Constitution provides that the legislature shall pass laws to regulate trial by jury, and maintain its purity and efficiency.

“§ 73. *Exceptions.* (A) In three States there is no constitutional right to trial by jury when the amount in controversy does not exceed a certain sum;¹ as in detail \$5: Md. C. 15, 6; \$20: W. Va. C. 3, 13; \$100: N. H. C. 1, 20.

“In one there is no jury in civil cases before a justice, — W. Va. But in one the right always exists when the title to real estate is involved, — N. H. And in three the right is expressly declared to extend to all cases at law, without regard to the amount in controversy:¹ Wis., Minn., Ark.

“(B) The Constitutions of nine States make an exception to the right to a jury ‘in cases heretofore used and practised,’ — N. H., Mass., Me., N. Y., Pa.,² Ill.,³ Md., Del., Mo.

“(C) In two the legislature may alter the law trial by jury as to causes arising on the high seas, or concerning mariners’ wages, — N. H., Mass.

“(D) In four the legislature may in civil cases authorize a trial by a jury of less than twelve men, — Mich. C. 4, 46; Col. C. 2, 23; Fla. C. 6, 12; La. C. 116. So, in eight States, in inferior courts (as before a justice of the peace), — Ill.; Iowa; N. C. (six men) C. 4, 27; Neb.; W. Va.; Mo.; Tex. C. 5, 17 (six men in the county court); Ga. (but not less than five men). So, in New Jersey, in civil suits involving less than \$50, by a jury of six men. And in California the parties may agree on a jury less than twelve in number. In West Virginia no jury is allowed in cases tried before a justice of the peace, except on appeal therefrom.

“(E) And by the Constitutions of three States, in civil actions, three fourths of a jury may render a verdict, — Tex. C. 5, 13; Cal.; Nev.

¹ “See § 72, note¹. ² This would seem to follow from the silence of the Constitution in other States. ³ The wording is, however, ambiguous.

"§ 74. *Waiver.* By the Constitutions of eleven States the right to a trial by jury may be waived by the parties in all civil cases in the manner prescribed by law, — Vt. C. 2, 81; N. Y. C. 1, 2; Pa. C. 5, 27; Wis. C. 1, 5; Minn. C. 1, 4; Md. C. 4, 1, 8; N. C. C. 4, 13; Ark. C. 2, 7; Cal. C. 1, 7; Nev. C. 1, 3; Fla. C. (Declaration of Rights) 3; Ariz. (Bill of Rights) 82.

"And by that of two States the right shall be deemed waived, in all civil cases, unless demanded by the parties, or one of them, in the manner prescribed by law, — Mich. C. 6, 27, Tex. C. 5, 10.

"So, in one State, the Constitution only provides that the right shall be preserved if required by either party, — W. Va. C. 3, 13."

IN CRIMINAL CASES.

"§ 131. *Jury Trial.* (A) In most States the Constitution provides that all persons so accused shall have a speedy public trial by an impartial jury, — Me. C. 1, 6; Vt. C. 1, 10; R. I. C. 1, 10; N. J. C. 1, 8; Pa. C. 1, 9; O. C. 1, 10; Ind. C. 1, 13; Ill. C. 2, 9; Mich. C. 6, 28; Iowa C. 1, 10; Minn. C. 1, 6; Kan. C. (Bill of Rights) 10; Neb. C. 1, 11; Md. (Declaration of Rights) 21; Del. C. 1, 7; Va. C. 1, 10; Mo. C. 2, 22; Ark. C. 2, 10; Tex. C. 1, 10; Ore. C. 1, 11; Col. C. 2, 16; S. C. C. 1, 13; Ga. C. 1, 1, 5; La. C. 7; N. M. 95, 1; 1851, July 12, § 8.

"So, in several, all persons prosecuted by indictment or information, — Ct. C. 1, 9; Wis. C. 1, 7; Ky. C. 13, 12; Miss. C. 1, 7; N. M. 50, 7. And in two States, all persons prosecuted by indictment (or presentment), — Tenn. C. 1, 9; Ala. C. 1, 7; Wash. 766.

"In several, the provision is simply that the accused shall have a speedy and public trial, — Cal. C. 1, 13; Dak. C. Cr. P. 11; Ida. Cr. Pr. 10; Mon. Cr. Pr. 9; Uta. Cr. Pr. 7; Ariz. 426.

"(B) And in three, the Constitution provides that (except as below) the legislature shall make no law subjecting a person to capital (or infamous, in Massachusetts) punishment without trial by jury, — N. H. C. 1, 16; Mass. C. 1, 12; S. C. C. 1, 14.

"(C) In two, that the right by jury shall remain inviolate in criminal cases, — N. Y. C. 1, 2; Col. C. 2, 23; Fla. C. (Declaration of Rights) 3. See also § 72 for other States.

"(D) In several, that no person shall be convicted of any crime but by the verdict of a lawful jury in open court, — W. Va. C. 3, 14; N. C. C. 1, 13; Wash. 767; Dak. C. Cr. P. 14; Ida. Cr. Pr. 13; Mon. Cr. Pr. 8; Uta. Cr. Pr. 10; N. M. 50, 8; Ariz. 429.

"(Except upon confession, demurrer, etc.: Wash., Dak., Ida., Uta., Mon., Ariz.)

"*Exceptions.* In two, the legislature may provide other means of trial (1) for offences not infamous. See above, B. So, in two others, for petty offences, — Del. C. 6, 15; N. C. So, in two others, all offences less than felony, and in which the penalty does not exceed \$100 or thirty

days' imprisonment, shall be tried summarily before a justice of the peace, — Iowa C. 1, 11; S. C. C. 1, 19. So, in Tennessee, no fine of more than \$50 shall be imposed except by a jury, — Tenn. C. 6, 14. But in all such cases of trial without a jury there must be a right of appeal, — Iowa, N. C., S. C.

"Laws may be made, in two States, for the government of the army and navy, without providing for trial by jury, — N. H., Mass.

"*Waiver.* The Constitution of California provides that a jury may be waived by consent of both parties in all criminal cases not amounting to felony, — Cal. C. 1, 7.

"So, in New Mexico, the accused may in all cases waive jury trial, — 1851, July 12, § 8."

For the corresponding provisions in the Constitution of the United States, see *ante*, p. 510.

In *Wynehamer v. The People*, 13 N. Y. 378, 457, the judges took a view better calculated than that adopted in *Van Swartow v. Commonwealth* (see *ante*, p. 860) to promote the object, which is not that the legislature may introduce new exceptions, but that there shall be none save those which existed when the organic law was passed. The intent was to preserve the right as it stood when the Constitution was adopted; and as the privilege is equally important whether the offence existed previously, or is a new creation, a distinction should not be made arbitrarily where there is none in principle. The inquiry should not be, Is the instance specifically new, but does it belong to a class in which the accused was entitled to the verdict of his peers?

LECTURE XL.

An Action may be maintained against an Officer or Agent of a State or of the General Government for Property taken or held under Cover of an Illegal Law or Order. — Such a Suit is not against the State or within the Terms of the Eleventh Amendment, nor does it transgress the Rule that a Right of Property cannot be judicially enforced against a Foreign Sovereign or Country. — The Maxim that the King can do no Wrong applies to the States and the United States, and Acts which transcend the Organic Law are to be imputed to the Persons by whom they are performed, though done at the Command of the Governor or of the President, or in Pursuance of an Unconstitutional Statute.

HAVING now considered the clauses which protect life, liberty, and property from deprivation by a State or the General Government, the question naturally occurs, What is the remedy if they are violated? and we may be surprised to find it seriously contended, as recently as the year 1882, that as regards property which has been wrongfully taken and detained by officers or agents of a State or of the General Government, there is none which can be effectually used as a means of redress. “No State shall deprive any person of life, liberty, or property without due process of law,” is the language of the Fourteenth Amendment; but if a man takes another’s land or goods, and does not rely on a State law or command, or an authority from the General Government, as a justification, it is simply a private wrong, for which, unless the question arises between citizens of different States, the federal tribunals cannot afford a remedy.¹ If, on the other hand, the wrongdoer alleges a command of the legislature or governor as a defence, and that he took and holds the property on behalf of the State, the plaintiff is confronted with the argument that

¹ *United States v. Cruikshank*, 92 U. S. 542; *Virginia v. Rives*, 100 Id. 373; *United States v. Harris*, 106 Id. 629. *Ante*, p. 534.

the State is a party in interest, and may throw her mantle as a sovereign around the person whom she employs or sanctions. By the terms of the Eleventh Amendment a State is beyond the reach of process, and as she necessarily acts through agents, the exemption would be illusory if an action could be maintained for property taken and detained at her command.¹ So the Fifth Amendment is, agreeably to this view, equally inoperative as a protection against Congress, the President, or a Cabinet officer, or, as it would seem, officials of a lower grade, because the United States may not be sued, and the privilege would be unavailing if they could be prosecuted through their officers and agents.² The *Monstrans de Droit* and *Petition de Droit* of the English law do not exist here, and there is nothing to take their place. Peremptory as is the prohibition against deprivation without due process of law, as thus interpreted, it reads as follows: The government shall not arbitrarily deprive the citizen; but if it violates the rule and does not choose to provide the means of redress, the jurisdiction of the courts will fail. During the ninety years which had elapsed since the Constitution was adopted, Congress had not seen fit to give a remedy, and might never consent to surrender a prerogative which rendered them despotic. An illegal claim by the United States to private property could not be enforced; but if they took and held the land or chattels under color of an invalid law or judgment, and the owner came into court for restitution, the suit would be dismissed, though brought against the persons in possession, because the government was the party in interest, though not of record. The prohibition was therefore virtually a dead letter and might so remain indefinitely. The source of the doctrine lay in the royal prerogative, which forbade a suit against the Crown. The States and the government of the United States were not less sovereign than a king, and if a citizen was dispossessed without due process of law, and sought redress, and it appeared that the

¹ *Poindexter v. Greenhow*, 114 U. S. 270, 285; *Marye v. Parsons*, Id. 325, 330.

² See *United States v. Lee*, 106 U. S. 196, 244.

wrong was done at the command of the government, or by an agent whom it avowed, the proceeding would fail for want of jurisdiction.

Such substantially was the view taken by the minority of the court in the case of the *United States v. Lee*,¹ which grew out of the following circumstances: The suit was brought for the recovery of an estate known as Arlington, which had been sold at the instance of the United States for taxes, and bid in by the government. Confiscation is forbidden by the Constitution even as a penalty for treason; but the board which was charged during the Civil War with "the collection of taxes in the insurrectionary districts" adopted a rule not to receive payment except from the owner in person, which was confiscatory in its operation when, as generally happened, he was within the Confederate lines, and could not directly tender the amount due. The plaintiff claimed as the heir of her mother, Mrs. Lee, to whom the land belonged under the will of her grandfather, George Washington Custis. She was the wife of General Robert Lee, who was in command of the Confederate forces in Virginia; and when her agent appeared before the commissioners he was told that they would not take the money unless she came herself. The land was then sold for unpaid taxes; but as a tender is equivalent to payment, there was no default, and the sale did not pass the title.

Such was the plaintiff's case, and no part of it was controverted by the defendants. But it was contended on their behalf that as they were in possession under the command of the President, and the property had been appropriated by the government to public uses as a military station and national cemetery for the burial of deceased soldiers and sailors, the court had no jurisdiction, and should direct a stay of proceedings. Such also was the ground taken by the Attorney-General, who appeared on the behalf of the United States, "without submitting their rights." This view was overruled in the trial court, and subsequently by the court of last resort, notwithstanding the dissent of four of the judges, who relied

¹ 106 U. S. 196.

on the English authorities as showing that in a case like that in hand, "no action can be maintained to recover the possession of land held by the Crown, its officers or agents," and that the proceedings should be dismissed at the suggestion of the Attorney-General. This depended on the general principle recognized by all civilized nations, that the sovereign is beyond the reach of process. "A sovereign cannot hold property except by agents. To maintain an action for the recovery of possession of property held by the sovereign through his agents, not claiming any title or right in themselves, but only as the representatives of the sovereign and on his behalf, is to maintain an action to recover the property against the sovereign; and to invade such possession of the agents by execution or other judicial process, is to invade the possession of the sovereign and disregard the fundamental maxim that he cannot be sued without his consent."¹ Such was the position of the minority of the court, and that would, if carried out, have led to incongruous results. For if a question like that which arose in the cases of *Entick v. Carrington*² and *Wilkes v. The Earl of Halifax* were argued before a tribunal holding such views, it would presumably decide that the plaintiff was entitled to damages, and yet they could not consistently allow him to maintain detinue for his books and papers in the face of an intimation from the Attorney-General that they had been taken and were held for the government.³

A majority of the court, on the other hand, were as distinctly in favor of the plaintiff's right to recover the homestead which she had lost through craft and violence. Her title was not denied, and had been established by the verdict of the jury; and the defence was that certain military officers, acting under the orders of the President, had seized the estate and converted one part of it into a military fort, and the other into a cemetery. It was not pretended that the President could lawfully give such a command, or that he could be au-

¹ *United States v. Lee*, 106 U. S. 196, 244.

² 19 State Trials. 1029.

³ See *Boyd v. United States*, 116 U. S. 616. See *ante*, p. 833.

thorized to do so by Congress, except in the exercise of the right of eminent domain and on due payment to the owner. The defendants stood solely upon the absolute immunity from judicial inquiry of every one who asserted an authority from the executive branch of the government, however clearly it might appear that the order was invalid. Not only was no such power as that exercised in the instance under consideration given to the executive or the legislature, but both were absolutely forbidden to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation. These provisions for the security of the citizen stood in the Constitution in the same connection and upon the same ground, and both were intended to be enforced by the judiciary as a co-ordinate department of the government. No man in this country is so high that he is above the law. No officer of the law can set that law at defiance with impunity. All the officers of the law, from the highest to the lowest, are creatures of the law and bound to obey it. Could it be said, in the face of all this and the acknowledged right of the judiciary to declare statutes passed by both branches of Congress and approved by the President to be unconstitutional, that the courts could not give a remedy when the citizen was deprived of his property by force, and his estate seized and converted to the use of the government without process of law and without compensation, because the order came from the President, and his officers were in possession? If such was the law of the United States, it sanctioned a tyranny which had no existence in the monarchies of Europe nor in any government which had a just claim to a well-regulated liberty and the protection of personal rights. It was accordingly established by a train of decisions that while a State was beyond the reach of process, an action might well be maintained against the officers of a State for the recovery of property which they held on her behalf, though the State stood behind them and was the real party in interest.¹

¹ *Meigs v. McClung*, 9 Cranch, 11; *Wilcox v. Jackson*, 13 Peters, 498; *Osborne v. The Bank of the United States*, 9 Wheaton, 738; *Grisar v. McDowell*, 6 Wallace, 363; *Brown v. Huger*, 21 Howard, 305.

The authorities which established that the public ships and other property of foreign and independent nations were not subject to the jurisdiction of the courts, did not apply, because these were cases which might involve war or peace, and must be primarily dealt with by the departments of the government which have the power to adjust them by negotiation, or to enforce the rights of its citizens by the sword. In such cases the judicial department of the government both in the United States and in England follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.¹ It followed that the circuit court was competent to decide all the issues involved between the parties that were before it, and the judgment must be affirmed.

We may readily acquiesce in this decision, and believe that an opposite conclusion would have been a long stride towards absolutism. As Professor Dicey observes, "the views of prerogative maintained by the Crown lawyers under the Tudors and Stuarts bear a marked resemblance to the legal and administrative ideas which at the present day support the *droit administratif* of France;" and had the contention of the Attorney-General prevailed, such ideas would have been ingrafted on the Constitution of the United States.² If, as we may infer, a like defence would be sustained in France, it is because the French people are politically and collectively rather than individually free, and a Napoleon who subverts the republic which he has sworn to maintain, finds the methods of despotism ready to his hand, and can use them arbitrarily without shocking a public opinion which regards the government as above the law.³

It may seem strange that the antiquated and cumbrous

¹ *The Exchange v. McFaddon*, 7 Cranch, 116; *Luther v. Borden*, 7 Howard, 1; *State of Georgia v. Staunton*, 6 Wallace, 50. See Vavassour v. Krupp, 9 Ch. Div. 351; *The Parlement Belge*, 95 P. D. 197; 1 Smith's Lead. Cas. (8 Am. ed.) 1061, 1065, notes to *Mostyn v. Fabrigas*. See *ante*, p. 140.

² Dicey, *Law of the Constitution*, preface, p. 6, Lecture V., p. 207.

³ Dicey, *Law of the Constitution*, 186-207; De Tocqueville, *L'Ancien Régime et La Révolution*, ch. iv. pp. 103, 109, 115. See *ante*, p. 141.

monstrans and *petition de droit* should remain on the statute-book as the means of vindicating the title of the subject to property held by the Crown : but we may be sure that were the grievance real, it would have been amended by a people who are of all men the most jealous of their rights. There was a time when kingly power bore hardly on the rights and liberties of the subject ; and such aggressions became frequent during the systematic attempt of Charles I. to establish the supremacy to the Throne. It was strenuously contended by the Crown lawyers, as it has been during the last twenty years in the United States, that the sovereign is beyond the jurisdiction of the courts, and that compelling his servants to surrender things or persons which they had taken at his command would fetter the hands of the government, and might at critical periods endanger the public safety. The refusal to discharge prisoners under a warrant from the Privy Council or issued by a principal Secretary of State without a definite cause assigned, and the condemnation of Hampden for declining to pay ship-money, were the result of this doctrine as administered by dependent judges ; and but for it the attempt of Charles I. to seize the five members would have been as insensate as it was ill-timed.¹

The quarrel was fought out in the Great Rebellion ; and the passage of the Habeas Corpus Act, which, in defining the jurisdiction of the courts, gave Englishmen an immunity from arbitrary arrest that is unknown to other European nations, was among the indirect results of the lesson taught by Cromwell. The Revolution of 1688 followed ; and by bringing the king under the control of Parliament, gave life, liberty, and property the security which they now enjoy.

It is not, therefore, to the reigns of the Tudors or Stuarts, or even to such of the despotic doctrines of that period as may still survive, that we should look for analogies, but to the principles and practice of the English Constitution as finally developed. Such a spoliation as that of Arlington is, and for two hundred years has been, inconceivable on the part of a monarch who must act through his ministers, and

¹ See *ante*, p. 136 ; Rushworth, pp. 409, 509, 529, 545.

may not set his sign-manual to any order which they do not approve. An English minister who desired to take private property for a public use without compensation would bring a bill into Parliament, and if that failed, would not venture to accomplish the object through an illegal mandate from the Crown. The restraint is political rather than judicial, and the entire machine is moved by the House of Commons, which is beyond the reach of the judiciary, and intolerant of any arbitrary act which it does not sanction.

There is an essential difference between such a system, and a government of enumerated powers and subject to prohibitions that are intended not as enunciations of principles which, though ordinarily obligatory, may, when the occasion requires it, be laid aside, but as bulwarks of individual rights, and demarcations keeping the States and the General Government to their respective spheres, and preventing the conflict of laws that might otherwise ensue. Such a method would obviously be impracticable without an arbiter authorized to speak for all parties and declare which interpretation should prevail. The judiciary was consequently erected into a co-ordinate, and for some purposes supreme, branch of the government, which acts as the balance-wheel of the most complex system ever devised by the wit of man. To hold that the federal courts cannot compel restitution where the wrong-doer is acting under an illegal mandate from the government, is to render them impotent where it is essential that they should be efficient, and put what Mr. Dicey happily calls "the law of the Constitution" entirely out of joint. There is the more need for judicial intervention because the departments of the General Government are not, as in England, so related as to give supremacy to one and render it responsible for the working of the entire machine. The President is the prime minister of the nation rather than its monarch, with no claim to the infallibility which the doctrine of divine right ascribes to kings, and cannot, when life, liberty, or property is concerned, ask that his command shall be a justification for a breach of the organic law. But he is at the same time, unlike an English minister, neither depend-

ent on nor removable by the legislature, and may proceed autocratically in the discharge of his functions as chief magistrate and commander-in-chief, with no political restraints save the liability to impeachment, which need scarcely be apprehended so long as his measures are in accordance with the passions and interests of the dominant party in either House of Congress, and he might, as the judgment in the *United States v. Lee* indicates, deal arbitrarily with the liberty and property of individuals if his orders could not be brought to the tests of law and justice as administered by the courts.

The framers of the Constitution cannot, therefore, reasonably be supposed to have intended that the prohibitions which they laid on the legislature and the executive should remain inoperative unless Congress saw fit to legislate for the purpose of carrying them into effect. Such an interpretation would subject the limitation to the discretion of the body which it was intended to restrain. Had it been imagined that Congress could, by a masterly inactivity, leave the way open for the deprivation which the Constitution forbids, the right of property would have been secured by some provision analogous to that which guarantees the privilege of the *habeas corpus*.

If the English government is to be copied, it should be viewed as a whole, instead of taking a single leaf as a sample of the rest. It does not merit the reproach which, had the minority opinion in *United States v. Lee* prevailed, might have been levelled against the United States, because complaints of the extortionate acts of the officers of the Crown seem to have been originally heard in the *aula regia* before the assembled barons; and when the Constitution took form under Edward I., the *Monstrans de Droit* and *Petition de Droit* became remedies which, though in the form of a supplication to the king, were of common right, and could not be denied consistently with the *nulli differemus, nulli negabimus justitiam vel rectum* of Magna Charta.¹ Parlia-

¹ See *Tobin v. The Queen* 16 C. B. (N. S.) 309, 357; *Baron de Bode's Case*, 8 Q. B. 208, 273, 310; *Chisholm v. Georgia*, 2 Dallas, 419, 442.

"In England it is easy to see that the method of redressing injuries

ment was, moreover, as the representative of the well-born, cultured, and wealthy classes, sure to be conservative where vested interests were concerned; and the entire system had the equipoise which might be wanting here but for the intervention of the judiciary.

The well-meant endeavor of the minority in the United States *v. Lee* to strengthen the hands of the government tended in the opposite direction, and would, had it prevailed, have left the United States open to the encroachments of the States, because a State is not only entitled to the benefit of the principle that a sovereign shall not be sued without his consent, but secured by the express words of the Eleventh Amendment in the enjoyment of the privilege. In *Osborn v. The Bank of the United States*,¹ Chief-Justice Marshall

to which the Crown is a party would be different from the remedy adopted in this country in case the United States be the aggressor, because of the principle underlying the English Constitution that the king can do no wrong. On this account, although it would not do to issue mandatory process against the sovereign, yet the law, being unwilling that private rights should be invaded in the conduct of public affairs and not redressed, has furnished the subject who is thus injured with a mode of obtaining redress which is consistent with the idea of kingly prerogative. The law allows him by petition to inform the king of the nature of his grievance, and as the law presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.' 3 Bl. Com. 255.

"This valuable privilege, secured to the subject in the time of Edward I., is now crystallized in the common law of England. As the prayer of the petition is grantable *ex debito justitiæ*, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject. . . . In this condition of the law regarding the Petition of Right, which is conceded to aliens as well as subjects, how can it be contended that the British government does not accord to citizens of the United States the right to prosecute claims against it in its courts? It is of no consequence that, theoretically speaking, the permission of the Crown is necessary to the filing of the petition, because it is the duty of the king to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases; and this proves nothing against the existence of the right." *United States v. O'Keefe*, 11 Wallace, 183.

¹ 9 Wheaton, 738.

gave judgment against the auditor of the State of Ohio for money which he had taken forcibly from the vaults of the National Bank on account of a tax illegally imposed by the State, and paid over to the State treasurer; but in the *United States v. Lee*, Mr. Justice Gray, speaking for himself and the other dissenting judges, intimated that restitution could not have been enforced but for the accidental circumstance that the treasurer received the money with notice, and kept it apart from the other public funds in his possession, so that it never came into the possession of the State, and might be specifically recovered.¹

Such *dicta*, sanctioned by such names, could not long stand in the pages of the United States Reports without being brought to the test of experience; and when, in *Greenhow v. Poindexter*,² the tax-collector of Virginia distrained the goods of the plaintiff below, notwithstanding a tender of the coupons which the State had contracted to receive in payment, it was strenuously contended that the injured party could not maintain detinue, because the suit was, if not against the State, for the recovery of property held by her officers in her behalf. The question came before the Supreme Court of the United States, and was decided in favor of the plaintiff on grounds which would suffer from abridgment. After referring to a numerous line of decisions in which redress had been afforded, although a State or the United States were parties in interest or indirectly concerned,³ the court observed:—

“The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence; he is bound

¹ See *United States v. Lee*, 106 U. S. 212, 244.

² 114 U. S. 285.

³ See *Mitchell v. Harmony*, 13 Howard, 115; *Bates v. Clark*, 9 Cranch, 11; *Wilcox v. Jackson*, 13 Peters, 498; *Osborn v. The Bank of the United States*, 9 Wheaton, 738; *Brown v. Huger*, 21 Howard, 305; *Grisar v. McDowell*, 6 Wallace, 363; *United States v. Lee*, 106 U. S. 196.

to establish it. The State is a political corporate body, which can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent, and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of Jan. 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else; and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia; but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrevocable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax thereafter taken to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence.

“No better illustration of this principle can be found than that which is furnished by the case of the *United States v. Lee*,¹ where it was applied to a claim made on behalf of the National Government. The action was one in ejectment, to recover possession of lands to which the plaintiff claimed title. The defendants were natural persons, whose defence was that they were in possession as officers of the United States under the orders of the government and for its uses. The Attorney-General called this aspect of the case to the attention of the court, but without making the United States a party defendant. It was decided by this court that to sustain the defence and to defeat the plaintiff's cause of action it was necessary to show that the defendants were in possession under the United States and on their behalf by virtue of some valid authority. As this could not be shown, the contrary clearly appearing, possession of lands actually in use as a national cemetery was adjudged to the plaintiffs. The decision in that case was rested largely upon the authority of *Osborn v. Bank of the United States*,²

¹ 106 U. S. 196.

² 9 Wheaton, 738.

which was a suit in equity against an officer of the State of Ohio who sought to enforce one of her statutes which was in violation of rights secured to the bank by the Constitution of the United States. The defendants, Osborn and others, denied the jurisdiction of the court, upon the ground that the State was the real party in interest and could not be sued, and that a suit against her officers, who were executing her will, was in violation of the Eleventh Amendment of the Constitution. To this objection Chief-Justice Marshall replied: 'If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be exempt from all judicial process, it would be subversive of the best-established principles to say that the laws could not afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit.' This language, it may be observed, was quoted with approval in *United States v. Lee*. The principle which it enunciates constitutes the very foundation upon which the decision in that case rested.

"In the discussion of such questions the distinction between the government of a State and the State itself is important, and should be observed. In common speech and common apprehension they are usually regarded as identical; and, as ordinarily, the acts of the government are the acts of the State, because within the limits of its delegation of power the government of the State is generally confounded with the State itself, and often the former is meant when the latter is mentioned. The State itself is an ideal person, intangible, invisible, immutable. The government is an agent, and within the sphere of the agency a perfect representative; but outside of that it is a lawless usurpation. The Constitution of the State is the limit of the authority of its government, and both government and State are subject to the supremacy of the Constitution of the United States and of the laws made in pursu-

ance thereof. So that while it is true in respect to the government of a State, as was said in *Langford v. United States*,¹ that the maxim 'that the king can do no wrong' has no place in our system of government, yet it is also true, in respect to the State itself, that whatever wrong is attempted in its name is imputable to its government, and not to the State, for as it can speak and act only by law, whatever it does say and do must be lawful. That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the mere wrong and trespass of those individual persons who falsely speak and act in its name. It was upon the ground of this important distinction that this court proceeded in the case of *Texas v. White*,² when it adjudged that the acts of secession, which constituted the civil war of 1861, were the unlawful acts of usurping State governments, and not the acts of the States themselves, inasmuch as 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States;' and that consequently the war itself was not a war between the States, nor a war of the United States against States, but a war of the United States against unlawful and usurping governments, representing not the States, but a rebellion against the United States. This is in substance what was said by Chief-Justice Chase, delivering the opinion of the court in *Thorington v. Smith*,³ when he declared, speaking of the Confederate Government, that 'it was regarded as simply the military representative of the insurrection against the authority of the United States.' The same distinction was declared and enforced in *Williams v. Bruffy*,⁴ and in *Horn v. Lockhart*,⁵ both of which were referred to and approved in *Keith v. Clark*.⁶

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say, 'L'État, c'est moi.'

"Of what avail are written constitutions whose bills of right for

¹ 101 U. S. 341.

² 7 Wallace, 700.

³ 8 Wallace, 1, 9.

⁴ 96 U. S. 176, 192.

⁵ 17 Wallace, 570.

⁶ 97 U. S. 454, 465.

the security of individual liberty have been written too often with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them, — and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders who are the instruments of wrong whenever they interpose the shield of State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked, and of communism, which is its twin, — the double progeny of the same evil birth.

“It was said by Chief-Justice Chase, speaking for the whole court in *Lane County v. Oregon*,¹ that ‘the people through the Constitution of the United States established a more perfect union, by substituting a national government, acting with ample power directly upon the citizens, instead of the confederate government, which acted, with powers greatly restricted, only upon the States.’ In no other way can the supremacy of that Constitution be maintained. It creates a government in fact as well as in name, because its Constitution is the supreme law of the land, ‘anything in the Constitution or laws of any State to the contrary notwithstanding,’ and its authority is enforced by its power to regulate and govern the conduct of individuals even where its prohibitions are laid only upon the States themselves. The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States, otherwise that Constitution would not be the supreme law of the land. When, therefore, an individual defendant pleads a statute of a State which is in violation of the Constitution of the United States as his authority for taking or holding property to which the citizen asserts title, and for the protection or possession of which he appeals to the courts, to say that the judicial enforcement of the supreme law of the land as between the individual parties is to coerce the State, ignores the fundamental principles on which the Constitution rests as contrasted with the articles of con-

¹ 7 Wallace, 71, 76.

federation which it displaced, and practically makes the statutes of the States the supreme law of the land within their respective limits.”¹

The above extract has been given at length, because the force of the argument would be impaired by putting it in other words, and the principle which it vindicates is essential to the security of the citizen, the supremacy of the General Government, and the stability of the several States. That this estimate is not exaggerated will be evident when we reflect that the doctrine which the judgment in *Poindexter v. Greenhow* refutes, leaves the way open for the deprivation which the Fourteenth Amendment forbids. No matter how gross the spoliation, even when the statute or order under which it is committed transcends the bounds set by the organic law, and although the property which is illegally taken to-day is found to-morrow in the hands of persons who while professedly holding it for a public purpose on behalf of the State, in fact take the rents and profits for themselves, the

¹ It has been said that although the injured party cannot maintain replevin, detinue, or ejectment for goods or land which have been wrested from him under color of an authority from a State or the General Government, an adequate measure of redress may be found in a suit for damages against the agents by whom the property is taken or detained, or he may obtain an injunction. *Marye v. Parsons*, 114 U. S. 325. Trespass is a poor substitute for ejectment where land is concerned, because the verdict is limited to the mesne profits, and the plaintiff is put to the delay, expense, and inconvenience of bringing successive suits, and would seem to be as much at variance with the doctrine which requires a *petition* or *monstrans de droit* to be filed where the prerogative is involved, as an ejectment or writ of entry. An unanswerable objection is that such a remedy is illusory unless the defendant has property which can be taken in execution, and may where, as in the *United States v. Lee*, the government is determined to carry out its design, be frustrated by choosing agents whose poverty will enable them to defy the sheriff. This remark does not apply to an injunction; but the summary intervention of a chancellor to forbid the President or the officers whom he employs to execute an act of Congress is a greater stretch of judicial power, and trenches more on the sovereignty of the State than does a judgment for the plaintiff in an action brought to test the title of the government to the property wrongfully acquired. See *ante*, pp. 129, 132.

rightful owner cannot, if the contention for the defence in *Poindexter v. Greenhow* and the *United States v. Lee* be sound, maintain replevin or detinue for his goods, or ejectment for his land, because the suit, though brought to evict the wrong-doers, is in legal contemplation against the sovereignty by which they are sanctioned or employed, and contrary to the Eleventh Amendment.

Carrying the same contention to its logical consequences, we should be led to a still more objectionable result. Were a State to improve on the *ex post facto* legislation condemned in *Cummings v. State of Missouri*, by enacting that all persons who declined to be arrayed under an oath to uphold an ordinance of nullification or secession should be deemed guilty of treason and their property confiscated, the recusants could not recover their land or goods through the local or federal courts, and would have to choose between submission and armed resistance. If they adopted the latter alternative, and the United States intervened on their behalf, the contest which ensued would not, agreeably to the same construction logically carried out, be waged for the purpose of subduing insurgents who had usurped an authority which the State could not confer, and to restore the government which they had virtually deposed, but against the State in her sovereign capacity; and if she were worsted in the struggle, the case would come within the rule that the vanquished is at the mercy of the victor, and may be dealt with as he thinks proper. Such a result, fortunately, cannot take place consistently with the principles of constitutional law as developed in England and applied to the Constitution of the United States.¹

An illegal command is none; and it is established under the judgments above cited, in accordance with the fundamental idea of our system, that the States and the United States, like the king, can do no wrong, and cannot be held accountable for acts done under color of an authority which, though conferred in terms and with the forms of law, is contrary to

¹ See *ante*, pp. 24-30, 35-58.

the provisions of the organic law.¹ As was finely shown in *Texas v. White*, the theory of the Constitution is an indestructible union of indestructible States; and the maintenance of the States and the preservation of their governments are as much within its scope as the preservation of the Union and the maintenance of the national government; and the fabric would be at the mercy of events if the sins of the legislature or a convention, could be imputed to the State which they affected to represent, and a conflict ensue, with the consequences incident to a war among sovereigns.

¹ *Texas v. White*, 7 Wallace, 700; *Thorington v. Smith*, 8 Id. 1; *Keith v. Clark*, 97 U. S. 454, 465.

LECTURE XLI.

Whatever Force is requisite for the Protection of Individuals or the Community is lawful. — The Principle applies in Peace, but has a Wider Scope during Insurrection or Invasion. — Arms may be used by the Sheriff in dispersing a Mob, and the Military employed in Aid of the Civil Power. — Soldiers act on such Occasions as Special Constables, and are answerable to the Law in Court for their Conduct. — Goods may be thrown Overboard during a Storm to preserve the Vessel, or a House blown up to arrest a Conflagration. — Destruction of Property during War to prevent it from falling into the Hands of the Enemy rests on the same Principle. — An Unlawful Command is not a Justification, though coming from the Chief Magistrate, a Court, General, or other Military or Civil Superior. — A Naval Officer or Collector is answerable for the Illegal Seizure of a Vessel under Instructions given by the President. — A Recovery in Damages may be had against a General or the Officer acting at his Command for the Seizure of Property during a Campaign, unless the Need was urgent or the Defendant had Probable Cause for so regarding it. — What constitutes such a Cause is an Inference of Law from the Facts, but the Facts are for the Jury.

AN account of the Constitution of the United States would manifestly be incomplete without an examination of the powers which belong more peculiarly to a state of war. These attained dimensions during the Great Rebellion which were probably not anticipated by the founders of the Republic; and it is important to ascertain the principles by which they are governed, and to what their growth may ultimately tend. Such an investigation does not necessarily embrace those powers which, although designed to provide for war, may legitimately be exercised by way of precaution during peace. Congress may, for instance, raise and support armies, and make rules for the government of the land and naval forces of the United States in the discharge of their ordinary functions, whether war does or does not exist. And a similar

remark may be made with reference to the larger part of the powers of the President as commander-in-chief.

War nevertheless requires the application of doctrines which, though not abnormal, have but a limited application in time of peace, and is another name for the use of force under circumstances requiring instant action. Without introducing a new principle, it enlarges the operation of principles which are inherent in the common law, and may be summed up under the head of national and personal self-defence, or that whatever force is requisite for the protection of individuals or the community is lawful.¹

When a riot assumes such proportions that it cannot be quelled by ordinary means, and threatens irreparable injury to life or property, the sheriff may call forth the *posse comitatus* and exercise an authority as their chief which can hardly be distinguished from that of a general engaged in repelling a foreign enemy or subduing a revolt. Arms may be used as in battle to bear down resistance; and if loss of life ensues, the circumstances will be a justification. The measure does not, however, cease to be civil, or fall beyond the rules which apply when a house is entered in the night by burglars, or a traveller shoots a highwayman who demands his money. Nor will it change its character because the military are called in and the sheriff delegates his authority to the commanding officer. As Lord Mansfield showed in the debate on the Lord George Gordon riots in 1780, soldiers are subject to the duties and liabilities of citizens although they wear a uniform, and may, like other individuals, act as special constables or of their own motion for the suppression of a mob, and if the staff does not suffice employ the sword. The intervention of the military does not introduce martial law in the sense in which the term is understood under despotic governments, and even by some distinguished jurists, because, agreeably to the same great magistrate and the settled practice in England and the United States, they are liable to be tried and punished for any excess or abuse of power, not

¹ See the Case of the King's Prerogative in Saltpetre, 12 Reports, 12.

by the martial code, but under the common and statute law.¹

A riot is not the only instance where necessity may confer powers that are unknown to the ordinary course of law; another may arise out of a conflagration. Ordinarily a man's dwelling is sacred to himself and his family, — a retreat which none can violate without the express mandate of the law. And yet it is every day's experience that when a fire occurs in a town or village the neighbors may enter without consulting the owner to extinguish the flames.² The axe may be applied to the roof or walls, and part of the premises demolished to save the rest or the adjacent property. And so far does this go that if the flames attain such a height that they cannot be arrested by ordinary means, the inmates of a house which is not on fire may be summarily ejected and the building blown up with gunpowder or destroyed by any other convenient means.³

Such cases depend on the right of the Commonwealth as an organic whole, and of individuals acting on her behalf, to do whatever is indispensable for the protection of life, liberty,

¹ 21 Parliamentary History, 695; Adolphus' History of England, iii. 297; 7 State Trials, 47; *Rex v. Pinney*, 5 Car. & Payne, 262; *The Case of Arms, Popham*, 121.

“Our soldiers are the king's subjects as well as other men, and it is well known that most of our magistrates, especially those concerned in the execution of the law, have a power to call on any of the king's subjects they can see to their assistance for preserving the peace or for enabling them to execute any of the king's writs; and in case of any such call, we likewise know that every one of the king's subjects is obliged to obey. . . . Why, then, may not a civil magistrate call the soldiers to his assistance as well as other men? . . . Therefore, while the king's troops act under the direction of the civil magistrate, and as his assistants only, we shall be as much under civil government as if we had no such troops.” Lord Hardwicke's speech in the Lords, Feb. 10, 1737 (9 Parl. History, 1297).

² *The King's Prerogative in Saltpetre*, 12 Reports, 12; *Mouse's Case*, Id. 63.

³ *Case of the Prerogative*, 12 Coke, 13; *Hale v. Lawrence*, 1 Zabriskie, 714. See *Philadelphia v. Scott*, 81 Pa. 80, 85; *The Mayor of New York v. Lord*, 17 Wend. 285; 18 Id. 12; *The Governor, etc., v. Monteith*, 4 Term Reports, 794. See also *ante*, p. 761.

and property, which is known in peace as the police power, and designated in war as martial law.¹ The right to act under such circumstances is not confined to public officers or persons acting under an authority conferred by statute ; and

¹ See *ante*, pp. 761, 784. That such a principle exists, and may justify acts which would otherwise be wrongful, is shown by the following citation from the King's Prerogative in Saltpetre, 12 Coke, 13: " Although the king cannot take the trees of the subject growing upon his freehold and inheritance, as it was now lately resolved by us the justices of England; and although he cannot take gravel in the inheritance of the subject for reparation of his houses, as the book is in 11 Hen. IV. 28, — yet it was resolved that he may dig for saltpetre for this that the ministers of the king who dig for saltpetre are bound to leave the inheritance of the subject in so good plight as they found it, which they cannot do if they might cut the timber growing, which would tend to the disinheritation of the subject, which the king by prerogative cannot do, for the king (as it is said in our books) cannot do any wrong. And as to the case of gravel, for reparation of the houses of the king, it is not to be compared to this case; for the case of saltpetre extends to the defence of the whole realm, in which every subject hath benefit. But so it is not in the case of the reparations of the king's houses; and therefore it is agreed in 13 Hen. IV. and other books that the king may charge the subject for murage of a town to which the subjects were charged in the time of insurrection or war for safety, and so for pontage, for this that he which is charged hath benefit by it; but the king cannot charge the subject for the making of a wall about his own house, or for to make a bridge to come to his house, for that does not extend to public benefit. But when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it, and therefore by the common law every man may come upon my land for the defence of the realm, and in such case on such extremity they may dig for gravel for the making of bulwarks; for this is for the public, and every one hath benefit by it. But after the danger was over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance. And for the commonwealth a man shall suffer damage; as for saving of a city or town a house shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said 3 Hen. VIII. fol. xv; and in this case the rule is true, *Princeps et republica ex justa causa possunt rem meam auferre*. It was resolved that this making of saltpetre is a purveyance of it for the making of gunpowder for the necessary defence of and safety of the realm."

private persons may, when the need is urgent, do of their own motion what self-defence or the preservation of the lives and property of others requires.¹ In *Mouse's Case*, which was trespass *de bonis asportatis* for a casket containing £114 in gold, the ferryman at Gravesend took forty-seven passengers in his barge, of whom Mouse was one; "and the barge being upon the water, a great tempest happened and a strong wind, so that the barge and all the passengers were in danger to be drowned if a hogshead of wine and other ponderous things were not cast out for the safeguard of the lives of the men. It was resolved *per totam curiam* that in case of necessity, for the saving of the lives of the passengers, it was lawful to the defendant, being a passenger, to cast the casket of the plaintiff out of the barge, with the other things in it, for *quod quis ob tutelam corporis sui fecerit, jure id fecisse videtur*."

For like reasons it is a sufficient answer to an action of trespass against a private citizen for arresting without a warrant, that a felony was committed and that he had reasonable cause to believe that the plaintiff was the criminal; and if this is proved, the suit will fail, although the charge was unfounded.² So far does the rule extend, that persons who witness the commission of a crime may break open the doors of a house in which the offender takes refuge, and use as much force as is requisite to apprehend him, without being answerable though he is unavoidably killed in the affray. The right nevertheless stands on the ground of necessity; and it should appear that the pursuit was immediate, and that there was not time to lay the case before a magistrate and procure a warrant. It is also said to be essential that he "who hath the suspicion should make the arrest, and not another, though at his command."³

¹ *Meeker v. Van Rensselaer*, 15 Wend. 397; *Wynehamer v. The People*, 13 N. Y. 378, 401, 439; *ante*, p. 762; *Rex v. Pinney*, 5 Car. & Payne; *Mouse's Case*, 12 Coke, 63.

² *Sir Anthony Ashley's Case*, 12 Reports, 92; *Wakely v. Hart*, 6 Binney, 316; *Brooks v. The Commonwealth*, 61 Pa. 353, 358; *Holly v. Mix*, 3 Wend. 350, 353. See *ante*, p. 761.

³ Such an arbitrary power cannot safely be intrusted to one who is not accountable for its abuse. Accordingly, Chief-Justice Markham is said to

The principle may, as the foregoing citations denote, be called into greater activity on the advent of war, which involves exigencies that cannot be met by ordinary means, and may render it necessary to subordinate the rights of individuals to the duty of guarding against a peril which menaces all.¹ It was applied in the case of *Sparhawk v. Respublica*,² on an appeal from the decision of the Comptroller-General denying the plaintiff compensation for the loss of certain barrels of flour which had been taken from him in 1777 under a resolution of Congress and by order of the Board of War of Pennsylvania, to prevent them from falling into the hands of the British troops, who were then approaching Philadelphia. The flour having been destroyed or carried off subsequently by the enemy, the question arose whether the owner was entitled to compensation from the State.

McKean, C.-J., said, in giving judgment, that the court would be governed in the determination of the cause by reason, by the law of nations, and by analogous precedents. The transaction happened *flagrante bello*; and many things are lawful in that season which would not be permitted in a time of peace. Unless the seizure could be justified by this distinction, it was clearly a trespass, rendering the defendant liable in damages. It was, however, a rule that it is better to suffer a private mischief than a public inconvenience, and necessity had rights which were recognized by the law. If a road was

have told Edward IV. that "the king cannot arrest a man for suspicion of treason, as others of his lieges may, for that if it be a wrong, the party grieved can have no remedy." *Prohibitions del Roy*, 12 Reports, 63, 64; 2 Institutes, 186; 1 Rushworth, 508. In other words, the king must not act in person, but through some one who will be answerable criminally or in damages. The warning is the more remarkable because addressed to a monarch who had vindicated his title by the sword; and the principle would seem applicable to arrests by the President, or in pursuance of a command given in his civil capacity, and not on the ground of the necessity which may justify a recourse to martial law, because he, like an English king, is beyond the reach of process during his term of office.

¹ See *The King's Prerogative in Saltpetre*, 12 Coke, 13. See *ante*, pp. 764, 908.

² 1 Dallas, 357.

out of repair, a passenger might lawfully go through a private inclosure.¹ So, if a man was assaulted, he might fly through another's close.² In time of war bulwarks might be built on private grounds;³ and the reason assigned was peculiarly applicable to the case in hand, — that the act complained of was for the public safety.⁴ So, also, every man might, of common right, justify the going of his servants or horses upon the banks of navigable rivers for towing barges, etc., to whomsoever the right of the soil belonged.⁵ And as the safety of the people was a law above all others, it was lawful to part affrayers in the house of another man.⁶ Houses might be razed to prevent the spreading of fire for the public good.⁷ There was indeed a memorable instance of folly recorded in the third volume of Clarendon's History, where it was mentioned that the Lord Mayor of London, in 1666, when that city was on fire, would not give directions for or consent to the pulling down of forty wooden houses, or to removing the furniture, etc., of the lawyers of the Temple, then on a circuit, for fear he should be liable for a trespass, and in consequence half that great city was burned. The court was clearly of opinion that Congress might lawfully direct the removal of any articles that were necessary to the maintenance of the Continental army or useful to the enemy and in danger of falling into their hands, for they were vested with the powers of peace and war, to which this was a natural and necessary incident. And the act being a lawful one, there was nothing in the manner of it which entitled the plaintiff to compensation for the consequent loss. This decision was followed in *Bronson v. Woolsey*,⁸ and an officer of the navy held not to be answerable for sinking a vessel which had been hired to the United States as a transport, and placed under his command, because the act was necessary to prevent the munitions of war on board from falling into the hands of the enemy.

¹ 2 Bl. Com. 36.

² 5 Bac. Abr. 173.

³ Dyer, 8; Brooks's Abridgment (Trespass), 213; 5 Bac. Abr. 175.

⁴ 20 Vin. Abr. (Trespass), B, a, sect. 4, fo. 476.

⁵ 1 Lord Ray. 725.

⁶ Reyl, 46; 5 Bac. Abr. 177; 20 Vin. Abr. fo. 407, sect. 14.

⁷ Dyer, 36.

⁸ 17 Johnson, 46.

The right to destroy under such circumstances has been recognized or upheld by the Supreme Court of the United States in various instances,¹ and is, in fact, simply an extension of the police power to commit infected goods to the flames.² Conversely, private property may, when the occasion imperatively requires it, be taken from the owner for the support of the troops or in aid of a warlike operation that must otherwise fail.³

These instances afford a sufficient proof that necessity has rights which the law recognizes in peace as well as in war, the difference being that a principle which is of rare and exceptional operation in seasons of tranquillity may under the pressure of hostilities become a dominant rule.⁴

It is equally plain that he who, either in war or peace, relies on the warrant of necessity for going beyond the boundaries which ordinarily separate right from wrong, takes the risk on himself of proving that the circumstances were such as to justify his conduct. If he succeeds in doing this, the defence is complete; if he fails, he may be civilly or even criminally liable, notwithstanding the goodness of his intentions or the command of a superior whom he could not safely disobey.⁵ Such is the rule of the common law as administered in England agreeably to all the books in which the question has been considered;⁶ and it has been repeatedly applied in the United States.⁷

There is the more reason for holding individuals answerable for executing an illegal governmental order or un-

¹ *Mitchell v. Harmony*, 13 Howard, 115; *Ford v. Surget*, 97 U. S. 605. See *ante*, p. 761.

² See *ante*, pp. 761, 763.

³ *Mitchell v. Harmony*, 13 Howard, 115.

⁴ Dicey, *Law of the Constitution*, Lecture VII. pp. 296, 300.

⁵ 2 *Institutes*, 186; Hale, P. C. 43; *Tobin v. The Queen*, 16 C. B. (N. S.) 310, 354.

⁶ *Rogers v. Rajendro Dult*, 13 Moore P. C. 236; *Mostyn v. Fabrigas*, Cowper, 180; Dicey, *Law of the Constitution*, 298, 311. See *ante*, p. 763.

⁷ *The Commonwealth v. Blodgett*, 12 Metcalf, 56; *Mitchell v. Harmony*, 13 Howard, 115, 135, 139; *Poindexter v. Greenhow*, 114 U. S. 270, 287.

constitutional statute because the government cannot be sued, and if an action did not lie against the agent, there would be no redress.¹ As was observed in *Rogers v. Rajendro Dult*, "the civil irresponsibility of the supreme power for tortious acts could not be maintained with any show of justice if its agents were not responsible for them. In such cases the government is bound to indemnify its agent, and it is hard on such agent if this obligation is not satisfied; but the right to compensation of the party injured is paramount."

In *Kilbourn v. Thompson*² an action was accordingly maintained against the Sergeant-at-Arms for arresting the plaintiff under a resolution of the House of Representatives, although the members were not answerable collectively or as individuals for advocating or ordering the arrest, and the loss incident to the execution of their command fell exclusively on him. The rule is essential to the successful working of a federal system which brings sovereign and co-ordinate powers face to face, and gives each a specific function. All must be kept in their respective places, but none are within the reach of process; and confusion would ensue if their agents were free from the restraints which cannot be laid directly on the principals.

A trespasser cannot, therefore, plead an illegal command of a State, of the United States, or of any branch or department of the government, as a reason why he should not be answerable before a jury for such damages as they may think proper to give. The rule applies to acts done by the military servants of the United States as well as the civil, and has been vindicated in cases growing out of the orders of the President, of the House of Representatives,³ and of commanding officers in time of war, and applies although the authority

¹ *Rogers v. Rajendro Dult*, 13 Moore P. C. 236; *Tobin v. The Queen*, 16 C. B. (N. S.) 310, 361; *Poindexter v. Greenhow*, 114 U. S. 270, 282; *United States v. Lee*, 106 Id. 196.

² 103 U. S. 168. See *ante*, p. 851.

³ *United States v. Lee*, 106 U. S. 196; *Kilbourn v. Thompson*, 103 U. S. 168. See *ante*, p. 888.

set up as a defence is the decree or writ of a court of justice or an unconstitutional statute.¹

"The only remaining question," said Washington, J., in *United States v. Jones*,² "is that the prisoner ought to be presumed to have acted under the orders of his superior officer, which it was his duty to obey. This doctrine, equally alarming and unfounded, underwent an examination and was decided in this court in the case of General Bright. It is repugnant to reason and the positive law of the land. No military or civil officer can command an inferior to violate the laws of his country, nor will such command excuse, much less justify, the act. Can it be for a moment pretended that a general of an army or a commander of a ship of war can order one of his men to commit murder or felony? Certainly not."³

The orders of the President, whether acting in his capacity as commander-in-chief or as chief magistrate, stand on the same plane in this regard as those given by the king, a sheriff, justice of the peace, colonel, or parish constable, and come under the general rule that the command of a superior will not justify the commission of an act which he cannot legally authorize the subordinate to perform.⁴

¹ *Poindexter v. Greenhow*, 114 U. S. 270; *Brown v. Compton*, 8 Term Rep. 424; *Campbell v. Webb*, 11 Md. 471; *Stetson v. Packer*, 7 Cushing, 562; *Cobb v. Cooper*, 15 Johnson, 152; *Carratt v. Morley*, 1 Q. B. 18; *The Case of the Marshalsea*, 10 Coke, 68, 76; *Williamson's Case*, 26 Pa. 9, 18; 1 *Smith's Lead. Cas.* (8th Am. ed.) 1111. See *ante*, pp. 24, 30, 35, 58.

² 3 W. C. R. 209, 220.

³ In *United States v. Carr*, 1 Wood, 481, the jury were instructed that "the killing of a soldier by the sergeant of the guard or in obedience to his command may be as clearly murder as the killing of one citizen by another. A soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime. For instance, an order from an officer to a soldier to shoot another for disrespectful words merely, would, if obeyed, be murder, both in the officer and soldier."

⁴ *Little v. Barreme*, 2 Cranch, 170, 178; *Gelston v. Hoyt*, 3 Wheaton, 248; *Commonwealth v. Blodgett*, 12 Metcalf, 56, 81; *United States v.*

In *Little v. Barreme* the action was trespass against an officer of the navy for the seizure of the plaintiff's vessel in accordance with instructions which were given by the President in consequence of a misinterpretation of the act of Feb. 9, 1799; and it was held that the commander of a ship of war acts at his peril in obeying orders, and if they are not warranted by the law, will be answerable in damages to any one who suffers from the wrong.

Chief-Justice Marshall said, in delivering judgment, "that he was at first disposed to think that a distinction ought to be taken between the acts of civil and those of military officers, and between proceedings within the body of the country and those on the high seas. The implicit obedience which military men usually pay to the orders of their superiors, and which indeed is indispensably necessary to every military system, appeared to him strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them. The inclination of his mind had been that where, in consequence of orders from the legitimate authority, a foreign vessel is seized with pure intentions, the claim of the injured party for damages should be against the government from which the orders proceeded, and would be a proper subject for negotiation. But he was convinced that this view was erroneous, and acquiesced in the opinion of his brethren, which was that the instructions could not change the nature of the transaction, or legalize an act which without them would have been a plain trespass."¹

Bright, 1 Wharton's Digest (4th ed.), 347; "Trial of Smith and Ogden," as cited in *The Commonwealth v. Blodgett*, 12 Metcalf.

¹ Agreeably to *Buron v. Denman*, 2 Ex. 167, a wrong done by a military or naval officer to the subject of a foreign power in pursuance of orders from his government, or ratified by it, is national, and the injured party cannot maintain an action for damages, but must seek redress through his own government, which may negotiate, or have recourse to arms. See *Elphinstone v. Bedreechund*, 1 Knapp P. C. 316; 1 Smith's Lead. Cas. (8 Am. ed.) 1063. The first thought of the Chief-Justice

It was held on like grounds in *Gelston v. Hoyt*¹ that the collector of the port could not rely on the President's command as a justification for the seizure of the plaintiff's ship, even if the case was within the provisions of the act of 1794 authorizing the employment of the land and naval forces of the United States to detain any vessel fitted out with a hostile purpose against a foreign government. It was contended, as the greater includes the less, that when the military arm might be put forth, it cannot be wrong to employ the civil. The defence was overruled, because a statute which transcends the common law should be strictly construed; and in designating the army and navy as the instruments, Congress must be presumed to have intended that the authority which the act conferred should not be exercised save in an extreme case, requiring a resort to military

was therefore presumably right as to the matter in hand; but such cases depend on the rules of international law, and do not affect the principle that an illegal act is not the less a ground for the recovery of damages because it is done in pursuance of a governmental command. To render the doctrine of *Buron v. Denman* available, the act must be done on behalf of the government by which it is ratified, and consonant with the laws of war; and one sovereignty cannot throw its mantle over a breach of the laws of another which has been committed for private ends, nor unless it would have been justifiable on the part of a belligerent.

In *The People v. McCloud*, 25 Wend. 482; 1 Hill, 377, a steamer which had been employed during the day in carrying supplies to aid an insurrection in Canada was burned after nightfall in an American port by a party of men who were arrayed against the insurgents; and it was held that a ratification by the English Government could not be pleaded to an indictment for the offence in the courts of New York. Such a case would now probably be removed into a federal tribunal, as involving a question under the Constitution of the United States.

Even when a governmental order is lawful, it will not be a justification for an act outside of the authority which it confers, though done in good faith under an innocent mistake of fact. See *Tobin v. The Queen*, 16 C. B. (N. S.) 310, 348; *Money v. Leach*, 3 Burr. 17, 42; and in *Madraes v. Will*, 3 B. & Ald. 353, a verdict of £20,000 was recovered against a naval officer for the destruction of a Spanish ship in the belief that she was engaged in the slave-trade and should be captured or sunk in the performance of his duty, and according to the treaties between England and Spain.

¹ 3 Wheaton, 242.

force, and where the ordinary course of law would be unavailing.

It is not less clear that although the justification must be based on necessity, and cannot stand on any other ground, it will be enough if the circumstances induce and justify the belief that an imminent peril exists, and cannot be averted without transcending the usual rules of conduct. For when the exigency does not admit of delay, and there is a reasonable and probable cause for believing that a particular method is the only one that can avert the danger, it will be morally necessary, even if the event shows that a different and less extreme course might have been pursued with safety. Whether the wooden houses should have been destroyed in the instance mentioned by Chief-Justice McKean¹ depended on the facts as then disclosed or apparent, and not on a result which could not be foreseen; and the indecision of the Lord Mayor would not have been less culpable if a sudden rain or shift of wind had extinguished the flames or given them another direction. What reason and duty dictate, is obligatory in morals; and such a necessity has always been deemed a justification by the law.²

The question arose in another form in the case of *Mitchell v. Harmony*,³ which was an action brought for the seizure of certain mules and wagons during the war with Mexico in 1847. Harmony, the plaintiff below, had accompanied the army into Mexican territory, and the property was taken while there to aid in the transportation of the baggage and supplies of the troops which were marching against the enemy. The defendant below pleaded not guilty, and also a special plea, justifying the taking under an order given by his superior officer, which was alleged to be lawful, and one that he was bound to obey. The judge before whom the case was tried instructed the jury that to justify a seizure of property, to prevent it from falling into the hands of the enemy, the peril must be immediate and urgent, not contingent or remote. It must be a case where the goods would in all probability be captured if not destroyed. This

¹ See *ante*, p. 762.

² See *ante*, p. 103.

³ 13 Howard, 115.

defence was not made out in fact. Another ground on which the defendant relied was that the goods had been taken for public use. The principle was undoubted; but it rested on the ground of necessity, and could only be applied where the need was extreme. If the enemy had been present in superior force, and there were no other means, the teams and wagons of the plaintiff might have been seized to aid in the transportation of supplies and stores. But there could be no right to take them for the purpose of strengthening the army and aiding in the accomplishment of a remote or ulterior object. In such a case there might be an expediency or advantage, but there was not that immediate and overwhelming necessity which could alone justify such a conversion of private property.

These views were sustained and the decision affirmed by Taney, C.-J., in delivering the judgment of the Supreme Court of the United States. "There are occasions where private property may be lawfully taken possession of or destroyed to prevent it from falling into the hands of the public enemy, and also where a military officer charged with a particular duty may impress private property or take it for public use. Under these circumstances the government is bound to make full compensation to the owner; but the officer is not a trespasser. But in every such case the danger must be present or impending, and the necessity such as does not admit of delay or the intervention of the civil authority to provide the requisite means. It is impossible to define the particular circumstances in which the power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of the facts as they appeared at the time will govern the decision, because the officer in command must act upon the information of others as well as his own observation. And if, with such information as he can obtain, there is a reasonable ground for believing that the peril is immediate or the necessity urgent, he may do what the occasion seems to require, and the discovery that he was

mistaken will not make him a wrongdoer. It is not enough to show that he exercised an honest judgment, and took the property to promote the public service, he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be ; and it will then be for the court and jury to say whether it was so pressing as to justify an invasion of private right. Unless this is established, the defence must fail, because it is very clear that the law will not permit private property to be taken merely to insure the success of an enterprise against the public enemy." It was equally plain that the order given by the commanding officer in the case in hand was not a justification. Urgent necessity could alone give the right, and if it did not exist, the command was illegal,¹ and did not vary the case. The point was so decided in a case cited by Lord Mansfield in *Mostyn v. Fabrigas* ;² and upon principle, independent of the weight of judicial decision, a military officer cannot justify himself for doing an unlawful act by producing the command of his superior.

This decision shows also that the question of probable cause is in this, as in most other instances, one of law for the court. The facts are for the jury ; but it is for the judges to say whether, if found, they amount to probable cause. From this case, taken in connection with that of *Sparhawk v. Respublica*, we may draw the following inferences: (1) Expediency, policy, and a sincere regard for the public good will not justify the arrest of a citizen or an invasion of the right of property either in peace or war. (2) Acts of this description may be justified on the ground of necessity, which must, however, be urgent, actual, and imminent. (3) A belief that such a necessity exists will not be sufficient unless it is also shown to be well founded. But if there are reasonable and probable grounds for believing that the peril is imminent and the necessity urgent, the party will not become a trespasser because the information on which he relies proves to be false ; for where the circumstances render it imperative to act, and cast the re-

¹ See Dicey, *Law of the Constitution*, 298, 311.

² 1 Cowper, 180. See *ante*, pp. 140, 914.

sponsibility on an individual, he must be governed by what appears or can be learned at the time, and there may be probable cause for a belief which has no foundation in fact.

A subordinate stands, as regards the application of these principles, in a different position from the superior whom he obeys, and may be absolved from liability for executing an order which it was criminal to give. The question is, as we have seen, Had the accused reasonable cause for believing in the necessity of the act which is impugned? and in determining this point, a soldier or member of the *posse comitatus* may obviously take the orders of the person in command into view as proceeding from one who is better able to judge and well informed; and if the circumstances are such that the command may be justifiable, he should not be held guilty for declining to decide that it is wrong with the responsibility incident to disobedience, unless the case is so plain as not to admit of a reasonable doubt.¹ A soldier, consequently, runs little risk in obeying any order which a man of common sense so placed would regard as warranted by the circumstances; and if the jury by whom the cause is tried render an erroneous verdict, the accused may be set at large by a pardon or through a motion for a new trial, which, though not allowed in England in criminal cases, is not infrequently granted in this country.

¹ See Dicey, *Law of the Constitution*, 312; *Stephen's History of the Criminal Law*, 205, 206.

LECTURE XLII.

Martial Law an Application of the Principle of the Police Power to the Exigencies of War. — The Right of a General during Insurrection and Invasion analogous to that of the Sheriff in quelling a Riot. — There is this Difference, that in dealing with the Enemy, whether Invaders or Insurgents, the General is beyond the Scope of the Municipal Law, and answerable only under the Laws of War. — The Citizens on whose Behalf the War is waged cannot be deprived of Life, Liberty, or Property except on the Ground of Necessity. — Martial Law is recognized to this Extent by the Common Law, and cannot be carried farther under the Constitution of the United States. — It has been said to be unknown in England, but may be exercised there during Insurrection. — Enemies, whether Invaders or Insurgents, may be tried and sentenced by a Court-Martial for a Violation of the Laws of War. — The Sentence of a Court-Martial conclusive where it has Jurisdiction, but in the Absence of Jurisdiction the Court and the Persons acting under it are alike Trespassers.

WE have seen that whatever force is requisite for the defence of the community or of individuals is also lawful. The principle runs through civil life, and has a twofold application in war, — externally against the enemy, and internally as a justification for acts that are necessary for the common defence, however subversive they may be of rights which in the ordinary course of events are inviolable. The application of the principle depends in the former case on considerations which are beyond the scope of the municipal law, and may be applied in the latter without waiting for the mandate of a court or the sanction of the legislature; although the question whether the necessity exists may be brought subsequently before a judicial tribunal, and will be concluded by the judgment. There is to this extent due process of law, because the parties who have suffered deprivation have their day in court when the exigency has passed, and may, if there was no sufficient cause, recover compensation in damages or

invoke the rigor of the criminal law. The right of a commanding officer to take private property for military use, to compel the inhabitants of a town which is threatened or besieged by a hostile force to labor for the erection of fortifications, or to arrest, imprison, or expel an individual who uses language calculated to induce the soldiers or townspeople to lay down their arms or revolt, will therefore be tested by the rule which applies to the conduct of the sheriff in using firearms to disperse a mob, — Was there reasonable and probable cause for believing in the existence of a peril that could be avoided in no other way?

There is this difference between the position of the sheriff and that of a commanding officer in the ordinary course of a campaign: the force used by the sheriff is on persons who, though acting illegally, are entitled to the protection of the laws; while the general employs force against an enemy whom it is his mission to destroy, and is responsible for what he does to the President or to a military tribunal, and not to the courts. If rioters are followed and cut down needlessly after they have dispersed, it is murder; but a general owes no account, save to his own conscience, for denying quarter to a flying enemy. The rule holds good when insurgents take the field against the government, and they may be dealt with in any way which the laws of war permit in the case of a foreign enemy. There is, and from the nature of the case can be, no distinction in this regard between an intestine and a foreign war, because the government would otherwise be at a disadvantage in dealing with rebellion. But the rule is confined to the forces arrayed on either side, and does not extend to the citizens who take no part in the military operations, although they may sympathize with the insurgents. Such is the doctrine of the common law as given by Sir Matthew Hale, with aid of an experience gathered from the protracted struggle which, fought out in every county in England, ended in the deposition of the King and placing Cromwell in his seat. "Martial law is something indulged, rather than allowed, as law, the necessity for discipline in our army being that which alone can give it countenance.

And this indulged law was only to extend to members of the army, or those of the opposite army, and was never so much indulged as to be executed upon others; for others who are not listed under the army had no color or reason to be bound by military constitutions applicable only to the army, whereof they were not parts. But they were to be ordered and governed according to the laws to which they were subject, though it were a time of war.”¹

The declaration of Lord Loughborough in *Grant v. Gould*:² “It is totally inaccurate to state martial law as having any place whatever in the realm of Great Britain,” should consequently be understood in this sense,—that the citizen does not cease to be under the protection of the laws, or become subject to a military and despotic rule on the occurrence of civil or foreign war, and not that insurgents are exempt from any force that may be employed against an invader. The line is distinctly drawn in Chief-Justice Cockburn’s charge to the grand jury with reference to the indictment for murder preferred against Colonel Nelson and Lieutenant Brand as members of the court-martial which had condemned George Gordon and Samuel Clark, on the 23d of October, 1865, during the negro rebellion in Jamaica: “A rebel in arms stood in the position of a public enemy. You might kill him, refuse him quarter, and deal with him in all respects as a public enemy. The jury must not confound with martial law applied to civilians what had been commonly done at many epochs of English history in the treatment of rebels taken in the field or in pursuit. . . . It was an egregious mistake to suppose that the punishment

¹ This statement implies that an indictment could not have been sustained or damages recovered against the officers on either side for acts done for the maintenance of discipline in their respective armies, nor, as it would seem, against them, or the men under their command, for death or wounds inflicted in the prosecution of hostilities. Such clearly would have been the case as regards the commanders of the royal forces; and had the rebellion been subdued, its leaders would presumably have been tried and convicted for treason, and not for the acts which went to make up the sum of that offence.

² 2 H. Bl. 69.

which might be inflicted " if a mutiny broke out in a ship or in a regiment " formed any part of martial law. There was one law paramount to all other laws, and this was, where illegal violence is used you may defend yourself, and repress that violence by any amount of force necessary for that purpose. You were not bound to submit to injuries inflicted by a man who attacks you with murderous intent, and wait for the redress which might afterwards follow. To use a common expression, you at once take the law in your own hands, and kill the offender by any means in your power. So in the case of mutiny, — you might put it down by force. But that was not martial law ; it was part and parcel of the law of England. It was a paramount right, recognized by all civilized countries, — the right when violence is threatened to quell it at once by any force which may be necessary. . . . Now the question before the jury was whether for the suppression of rebellion you might not subject persons who are not actively engaged in it, and whom you could not kill upon the spot, to a law which was in this sense entirely exceptional, and to be carried into execution in an exceptional way. There was no authority for the support of any such proposition."¹

Earnest as was the Chief-Justice, the grand jury ignored the bill, — as English and American jurors are apt to do when they believe that soldiers have acted in good faith for the defence of society under difficult circumstances and in seasons of extreme peril.

Superficially, it might appear that the Chief-Justice was of opinion that no exigency, whether in peace or war, can so far vary the case as to bring the great body of the community which is not " enlisted " or combatant, under military control. Reading between the lines, however, it will be seen that he admitted the paramount law common to all countries, — that whatever force is necessary for self-defence is also lawful. This law, applied nationally, is the martial law, which is an offshoot of the common law, and although ordinarily dormant in peace, may be called forth by insurrection or inva-

¹ Annual Register (N. S.) for the Year 1867 (London, pp. 230, 234).

sion. War has exigencies, that cannot readily be enumerated or described, which may render it necessary for a commanding officer to subject loyal citizens, or persons who though believed to be disloyal have not acted overtly against the government, to deprivations that would under ordinary circumstances be illegal; and he must then depend for his justification, not on the laws of war, but on the necessity which, as has been here seen, may warrant the taking of life, and will therefore excuse any minor deprivation.

The occurrence of hostilities does not vary the position of the citizen, or deprive him of the protection of the common law. For any injury or violence inflicted under color of military authority he may still seek the redress from the civil tribunals which it is their duty to afford in all seasons.¹ As regards the enemy, however, force may be used in any form which the law of nations permits, and with the avowed object of destruction. Life may be taken on the battlefield or by the slower process of blockade and famine, barns and houses may be fired, crops destroyed, cattle slaughtered or driven off, — in fine, every means of havoc employed which nature or science has placed within the reach of man. The laws of war, it is true, impose certain restraints which, by common consent, cannot be violated; but they are to a great extent elastic, varying with the occasion, and yielding to the dictates of necessity. On a critical examination of the subject the only real limit will be found to be that useless cruelty must be avoided, and no suffering inflicted which is not requisite to overcome the enemy. A flourishing city may accordingly be laid waste by bombardment, supplies cut off from a populous town or district, or a vessel filled with passengers sunk at sea, even when, as often happens in such instances, the loss and suffering are chiefly borne by non-combatants or neutrals. The commanding general is, moreover, the judge in the first instance of what the laws of war permit and the exigency of the case requires, and if answerable to his military superiors for going beyond the proper limits, cannot be called to account by the civil or municipal law. He may be dismissed

¹ *Tyler v. Pomeroy*, 8 Gray, 480.

by the President, or tried and sentenced by a court-martial; but an indictment will not lie for an injury done *flagrante bello* to an alien enemy, or the inhabitants of a territory which is occupied by the enemy, and may therefore temporarily be treated as hostile; nor can the sufferer maintain an action for damages after the return of peace.¹ To refuse quarter on the field of battle, or convict and hang a prisoner of war as a spy without sufficient cause, may be a gross offence against humanity and morals, but is not murder under the common or statute law. A spy or an assassin who enters the lines, or lurks near the camp with a hostile purpose, cannot claim the protection which the law of nations accords to honorable warfare. He is, when taken, absolutely at the disposal of his captors, and may be executed, if the case is plain, without the form of trial. Under such circumstances the officer in command has the power of life and death in his hands, and may investigate and decide the case himself, without requiring the advice of others. If a court-martial is assembled, it acts as an inquest rather than a court; and the execution takes place, not by virtue of the sentence of the judges, but under the immemorial right of the victor to dispose as he thinks fit of the vanquished.

The question whether the accused has transgressed the laws of war is not, however, the only one which may arise when a prisoner is brought before a court-martial; it is also necessary to determine, Is he an enemy, and subject to their operation? In a foreign war this ordinarily admits of little doubt; because every one who owes a permanent or temporary allegiance to the hostile power is in contemplation of law hostile, and may be so treated.² Such also is the rule when a citizen is found in arms against his country or acting as a spy or emissary in a foreign or civil war. Under these circumstances he is guilty of treason under the doctrines of the municipal law; but this is a crime of which the laws of war have no cognizance. They know him as an enemy, and only as such, — entitled to

¹ See *Coleman v. Tennessee*, 97 U. S. 513.

² *Ford v. Surget*, 97 U. S. 605; *Coleman v. Tennessee*, 97 U. S. 513.

quarter if he makes war openly, liable to death if he comes in disguise or has recourse to means which the rules of honorable warfare forbid. These rules have their basis in the instinct of self-preservation,—that wells must not be poisoned, that the weakness of the camp shall not be revealed, that the soldier shall not be in danger of assassination. A citizen who violates them is, equally with an alien, liable to be punished summarily; and as he may be put to death at once, so he cannot complain if his execution is deferred from motives of humanity until the facts can be ascertained by a court-martial. This results from the universally admitted right to avert peril by the death of the aggressor, and is a branch of the law of necessity, to which reference has already been made. Otherwise the citizen who took up arms against his country would be in a better position than an alien, and might resort with impunity to measures from which the latter would refrain from fear of retribution. Still, the members of the court-martial act in this, as in most other instances, at their peril. They have no jurisdiction unless the accused has, by taking part with the enemy, forfeited the right to a trial by jury and in the ordinary course of law; and they cannot, on well-established principles, give themselves jurisdiction by a false or erroneous assumption of any fact on which that jurisdiction depends.¹ If the person against whom the charge is brought has not rendered himself amenable to the military law, the whole proceeding is *coram non judice* and void; and they who take part in it are not only liable as trespassers, but may, if they proceed to judgment and execution, be convicted of murder by a civil tribunal.² And on this capital point, on which the validity of all the rest depends, the sentence of the court-martial is so far from being conclusive that if the members are called to account for what they have done, they must plead and establish all the facts which were conditions precedent to the exercise of their authority,

¹ *Dynes v. Hoover*, 20 Howard, 65, 80; *Smith v. Shaw*, 12 Johnson, 267; 1 *Smith's Lead. Cas.* (8 Am. ed.) 11126.

² *Mostyn v. Fabrigas*, Cowper, 161; 1 *Smith's Lead. Cas.* (8 Am. ed.) 1027, 1041. See *ante*, p. 140; *Antrim's Case*, 5 Phila. 278, 288.

and, among others, that the status of the offender was such as to bring him within their jurisdiction.

The principle is not peculiar to courts-martial ; it applies to all limited and inferior tribunals, and even to courts of general jurisdiction when manifestly acting beyond the scope of their powers.¹ The members of a court-martial are nevertheless entitled to the benefit of a principle not unlike that which prevails where an arrest or seizure is made under an order given by a commanding officer, that if they have reasonable and probable cause for believing that the prisoner is within their jurisdiction, it will be a defence, although the fact should turn out to be the other way. This rule applies generally for the protection of the judges both of superior and inferior courts, and ought to operate on behalf of a military tribunal.²

In a memorable instance, where the persons alleged to have been implicated in the assassination of a President of the United States were convicted and hanged by the sentence of a court-martial, the jurisdiction of the court depended, if the views which I have presented are correct, on whether the defendants could properly be considered as enemies, who, having waged war against the United States by undue means, could not claim quarter or protection consistently with the laws and usages of war. There was much to justify such an opinion, because they had conspired to kidnap the President and to carry him into the hostile lines while the Rebellion was still on foot and Washington virtually besieged ; and although the deed was done after the Southern troops had laid down their arms, war once commenced does not end until both parties agree on terms of peace.

¹ The Case of the Marshalsea, 10 Coke, 68, 76 ; Williamson's Case, 1 Casey, 9, 18 ; Duffield v. Smith, 3 S. & R. 390 ; 1 Smith's Lead. Cas. (8 Am. ed.) 1108.

² Calder v. Halkett, 3 Moore P. C. C. 28, 78 ; 1 Smith's Lead. Cas. 1147.

LECTURE XLIII.

Military Law, Military Government, and Martial Law. — Military Law as authorized by the Constitution consists of the Rules made by Congress for the Government of the Land and Naval Forces of the United States. — It and the Jurisdiction of the Tribunals convened under it are confined to Persons in the Military or Naval Service of the Government. — A Citizen cannot be brought within the Jurisdiction of a Court-Martial by finding that he is an Enemy or Soldier, contrary to the Fact. — Officers of the Army and Navy accountable to the Civil Courts for their Conduct to the Men under their Command. — Soldiers hold a Twofold Relation, and may be punished for the same Act by a Court-Martial and by the Civil Tribunals. — Congress cannot exempt Persons in the Naval or Military Service from Liability for Acts done contrary to the State Laws. — The Power “to make Rules for the Government of the Land and Naval Forces” should be read in the light of the “Mutiny Act.”

It is important to ascertain how far the doctrines of the common law as already stated have been modified or enlarged by the Federal Constitution, and whether Congress can legislatively supersede the judiciary and establish the French *état de siège* throughout the United States. There are two subordinate inquiries, — What power may be exercised during war or insurrection over the hostile territory? Can the military be placed beyond the jurisdiction of the State and national tribunals, and erected into a privileged class who are accountable only to their commanders, or courts constituted by them? Agreeably to the opinion of Chief-Justice Chase in *Ex parte Milligan*,¹ there are under the Constitution three kinds of military jurisdiction, — one to be exercised in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents; and a third to be

¹ 4 Wallace, 141.

a town or district menaced with a siege or insurrection to take the requisite measures to repel the enemy, and depends, for its extent, existence, and operation, on the imminence of the peril and the obligation to provide for the general safety. As the offspring of necessity, it transcends the ordinary course of law, and may be exercised alike over friends and enemies, citizens and aliens.

Military law is expressly authorized by the Constitution, which declares that Congress may make rules for the government and regulation of the land and naval forces, and excepts the army and navy of the United States, together with the militia when in actual service, from the provision of the Fifth Amendment, — that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury.¹ Congress have exercised this power by establishing a military code for the government of the land and naval forces, under which courts-martial may be convened for the trial and punishment of offences against the discipline and regulations of the service. A commanding officer may also, when the maintenance of discipline requires it, and the case will not admit of delay, inflict punishment summarily, without convening a court-martial.² But as his power is under these circumstances unbounded, and may extend to the deprivation of life, it must, in order to prevent abuse, “be exercised in due subordination to the jurisdiction which the law hath from time to time established for the prevention of wrong, and to which all men are of common right entitled to apply for redress.” An officer cannot, therefore, rely exclusively on his position as such as a justification for the restraint or chastisement of an inferior.³ He must show some actual or probable cause which rendered the exercise of his authority necessary and proper for the good of the service, and that the punishment did not unduly exceed the offence.⁴ It was said by Chief-Justice Eyre, in *Sutton v. Johnson*,⁵ to

¹ Constitution, Article I., sections 8, 14. Amendments, Article V.

² *Wilkes v. Dinsman*, 7 Howard, 89; 12 Id. 390.

³ *Wilkes v. Dinsman*, 7 Howard, 89; *Wilson v. Mackenzie*, 7 Hill, 89.

⁴ *Wilkes v. Dinsman*, 7 Howard, 89.

⁵ 1 Term, 493, 504.

be the felicity of those who live under a free Constitution that no power, however absolute, can be abused to their hurt with impunity; and notwithstanding the view taken by the minority of the court in three recent cases of great moment,¹ we may hope that this is as true of the United States as it is of England.²

In *Wilson v. Mackenzie*,³ the defendant pleaded to an action of trespass for blows inflicted on the plaintiff with a rope, and for confining him in irons, that the plaintiff was at the time of the injuries complained of a duly enlisted seaman, serving on board of a vessel of the navy, and as such lawfully under the order of the defendant, who was the commanding officer, and by virtue of his authority and in the exercise of the discipline of the service did the acts alleged in the declaration. This plea was held bad on demurrer, on the ground that the office and authority of the defendant were not a justification unless there was some reasonable and probable cause for the order, which should have been averred, and the question submitted to a jury as one of fact, subject to the instruction of the court.

Even when the officer acts within the scope of his powers, and for probable cause, and the punishment is such as the law allows, he may still be liable if he proceeds maliciously and with a design to oppress and injure his subordinates. The question arose in *Wilkes v. Dinsman*,⁴ where the court held that an action might be maintained against the commander of a squadron for lashes inflicted on a marine under his orders, and keeping him in custody, although the defendant had been acquitted by a court-martial convened to try the same charge at the instance of the plaintiff. It was conceded on the evidence that the plaintiff had been guilty of insubordination, and that the punishment was one which the defendant

¹ *Ex parte Milligan*, 4 Wallace, 141; *Cummings v. Missouri*, Id. 277; *United States v. Lee*, 106 U. S. 196, 633.

² See *Poindexter v. Greenhow*, 114 U. S. 271, 287, which encourages such a belief, and *Mitchell v. Clark*, 110 Id. 633, which points the other way.

³ 7 Hill, 95.

⁴ 7 Howard, 89; 12 Id. 390.

might lawfully inflict for that offence; but there was still room for the decision of a jury whether the chastisement was excessive and unreasonable, and as to the motives actuating the defendant. The presumption was in his favor, as in that of every one acting as a judge or exercising a judicial discretion; but it might be rebutted by proof that his power was abused. In these instances the defendant took the burden of responsibility on himself without a court-martial; and the sentence of a court-martial, duly convened and acting within the limits of its powers, like that of every other competent and duly constituted tribunal, is conclusive, and a justification for the persons who carry it into effect.¹

To make the judgment of any court effectual, it must nevertheless have jurisdiction of the cause and the parties, which will not be presumed in the case of limited and inferior tribunals, but must be shown by those who rely on the judgment as a defence.² If, therefore, a court-martial sentence a person who is not subject to their jurisdiction to a lawful punishment, or inflict an unlawful punishment on one over whom their authority extends, they will be trespassers, and may be made answerable civilly or criminally for the offence.³

In *Wise v. Withers*,⁴ the Supreme Court of the United States held that inasmuch as the plaintiff was a justice of the peace, and could not legally be enrolled as a militiaman, he was not subject to the jurisdiction of the court-martial; and it was well settled that the decision of such a tribunal in a case clearly without its jurisdiction did not protect the officer who executed it. The court and the officer were alike trespassers. The same doctrine was enunciated in *Dynes v. Hoover*,⁵ and is sustained by the authorities in this country and in England, which show that the members of a mili-

¹ *Dynes v. Hoover*, 20 Howard, 65, 83.

² 1 Smith's Lead. Cas. (8 Am. ed.) 1108, 1125.

³ See *ante*, p. 141; *Mostyn v. Fabrigas*, Cowper, 161; 1 Smith's Lead. Cas. (8 Am. ed.) 1041; *Dynes v. Hoover*, 20 Howard, 65, 80; *Tyler v. Pomeroy*, 8 Allen, 480, 485.

⁴ 3 Cranch, 331.

⁵ 20 Howard, 65, 81.

tary tribunal take the risk of every excess of jurisdiction, and cannot screen themselves by alleging that they mistook the facts, or erred from a want of knowledge of the law. If the cause and the parties are within the jurisdiction of the court, and the sentence such as the law sanctions, there can be no inquiry into motives, or whether it was in accordance with the evidence; but the burden of showing that the condition precedent was fulfilled is, as in the case of other inferior tribunals, on the persons who compose the court or act under their authority.¹

A court-martial cannot, by deciding that a person who is not in the military or naval service of the United States is in such service, render him amenable to their jurisdiction, or preclude the civil courts re-examining the question collaterally, and liberating him through a habeas corpus.² Such a power would enable a military commission arbitrarily to convert citizens into soldiers, and then treat them as subject to the military law, and no man would be secure from an arrest that might end in his being assigned to a regiment and ordered to a remote corner of the United States, or to a foreign country.³

It is, as we have seen, a fundamental principle of the English Constitution that the military shall be subordinate to the civil authorities, and accountable for what they do in the ordinary course of justice, even when they are employed to disperse a mob by force of arms, or acting under the orders of the chief magistrate or a military superior.⁴ This rule was adhered to in the English Colonies, and has been fol-

¹ 1 Smith's Lead. Cas. (8 Am. ed.) 1111, 1121, 1126, 1144; *Dynes v. Hoover*, 20 Howard, 65, 83; *The Case of the Marshalsea*, 10 Coke, 68, 77; *Smith v. Shaw*, 12 Johnson, 257; *Mills v. Martin*, 19 Id. 7; *Rathbone v. Martin*, 20 Id. 843; *Grant v. Gould*, 2 H. Blackstone, 69; *Ex parte Milligan*, 4 Wallace, 3, 129; *Wilson v. Mackenzie*, 7 Hill, 95, 99; *Duffield v. Smith*, 3 S. & R. 590.

² See *ante*, p. 141; *Mostyn v. Fabrigas*, Cowper, 161; 1 Smith's Lead. Cas. (8 Am. ed. 1041); *Antrim's Case*, 5 Philad. R. 278; 5 Wheaton, 17, 20, 64; 12 Id. 34.

³ See *Antrim's Case*, 5 Philad. R. 278.

⁴ Dicey's Law of the Constitution, 310. See *ante*, p. 906.

lowed since the declaration of independence.¹ It is of the first importance, because a government which is beyond the reach of process, and can enforce its orders through an army which is responsible only to a tribunal consisting of its own members, is practically absolute, whatever it may be in theory. Congress have accordingly, like Parliament, been so jealous of military power that while a soldier who has been guilty of an offence against a citizen or another soldier may be sentenced by a court-martial for the act considered as a breach of military rules, he is still amenable to the civil authorities, and may be made answerable before a jury for the violation of the laws of the State where the act was done.²

An officer or soldier cannot, therefore, be placed beyond the reach of the common law by convening a court-martial and directing it to try the case, nor will an acquittal or conviction by such a tribunal be a bar to an indictment; the reason being that although the act is one, there are two offences, and each jurisdiction may take cognizance of so much of the injury as is peculiar to itself.³ Such is the established rule in England; and although Congress are authorized to make rules for the government of the land and naval forces, they cannot, according to the generally received opinion, confer exclusive jurisdiction on the military tribunals unless the wrong is committed without the limits of the United States, or in some State which is temporarily in the possession of a hostile force and where there are no courts that recognize the authority of the federal government.⁴

The right of the States to make needful rules for the preservation of health and order, and to protect life, liberty, and property, commonly known as the police power, was never surrendered, and is impliedly reserved to them in the

¹ See *ante*, p. 143.

² See *Coleman v. Tennessee*, 97 U. S. 513; *The People v. Godfrey*, 17 Johnson, 225; *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 538.

³ See *Fox v. Ohio*, 5 Howard, 410; *United States v. Marigold*, 9 Id. 560; *Moore v. Illinois*, 14 Id. 13; *Coleman v. Tennessee*, 97 U. S. 519.

⁴ See *Coleman v. Tennessee*, 97 U. S. 519, 531.

Constitution.¹ It cannot, therefore, be impaired by Congress; and that it would be so impaired by an act precluding the State tribunals from taking cognizance of murder, robbery, and other private or public wrongs done within their respective jurisdictions by persons in the military or naval service of the United States, is too plain for argument. The civil tribunals of the United States cannot proceed in such cases without infringing the rights reserved to the States and to the people; and it is therefore incongruous to suppose that they can be placed exclusively under military control in time of peace, and when there is no reason for the application of martial law. As above stated, there are in every such instance two offences, — one against the State, the other against the rules framed for the government of the army and navy; and it is the latter only that can be tried and punished by a court-martial.

It was nevertheless intimated in the recent case of *Coleman v. Tennessee*² that the Constitution does not recognize these principles, and that Congress, under the power to make rules for the government of the land and naval forces, may give military tribunals exclusive jurisdiction over offences committed by persons in the military service of the United States. Were such a statute to be enacted, the check which the common law imposed on the abuse of military power would be withdrawn, and soldiers might be employed to overawe the judges or intimidate the people, with the certainty of an acquittal by courts composed of the officers who had ordered or participated in the outrage.³ The rule that

¹ See *ante*, pp. 523, 539; *United States v. De Witt*, 99 Wallace, 44; *License Cases*, 5 Howard, 504; *Coleman v. Tennessee*, 97 U. S. 509, 531.

² 97 U. S. 509, 514.

³ That this is not a chimerical apprehension is shown by General Jackson's arrest and imprisonment of the Louisiana judge who, during the War of 1812, had ventured to issue a habeas corpus, "thereby exciting mutiny in my camp." True, the court had its revenge on the return of peace by fining the general in the sum of \$1000 (see 2 Winthrop's Military Law, 45; *Johnson v. Duncan*, 3 Martin (La.), 530); but no such penalty could be inflicted were the jurisdiction of the military courts made exclusive, in accordance with the opinion in *Cole-*

an illegal command is not a justification, which is the cornerstone of English and American freedom, has no place in the military code, and could not be recognized by a court-martial. The military would form a privileged class above the law, and be ready instruments for the subjugation of any section that was obnoxious to the dominant party in Congress. If soldiers were quartered in houses without the consent of the owners, or employed in making unreasonable searches and seizures, contrary to the Third and Fourth Amendments, there would be no redress except through a resource to tribunals constituted by the general whose orders gave occasion for the wrong. An order to pay the amount due on a note or bond or for rent into the military chest would, agreeably to *Mitchell v. Clarke*,¹ be a defence to a suit brought to enforce the obligation, and a creditor might thus be deprived of his rights without legal process at the whim of a commander, who would in his turn be screened from liability by an act of indemnity. No man would be safe from an arrest that might end in his being sentenced and executed by a military commission for some act which was not punishable when committed, or that could not legally be visited with the penalty of death. In fine, every constitutional guaranty might be reduced to a dead letter, and a despotic rule established during peace in the oppressive form in which it was employed under Charles I.

man *v. Tennessee*. Render the soldier irresponsible, or, what comes to the same thing, answerable only to the military law, and a military commission becomes the court of last resort,—a tribunal from which there is no appeal. The centre of authority is then in the army, or the President as its head, because a general may imprison the judges, while the judges cannot try the general. The Supreme Court should be careful not to put the sword too far above the gown, lest they or their successors should repent, when it is too late, in the custody of the provost-marshal. Things equally strange and unexpected have come to pass, and Cromwell's order, "Remove that bauble," the *coup d'état*, with the wholesale arrests and deportations which cut the thread of the French Republic and made Louis Napoleon emperor, and, I may add, McClellan's summary ejection of the Maryland Legislature who were planning secession, would each have seemed a few years or months previously too incredible for conjecture or belief.

¹ 110 U. S. 633.

to break the spirit of every Englishman who ventured to raise his voice against the exactions of the Crown.¹ The sufferers might conceivably obtain a judgment for damages, but the execution would go into the hands of a sheriff who was himself in jeopardy, and be as futile as were the writs of habeas corpus that were issued during the Civil War to test the validity of the military commissions which tried, sentenced, and executed civilians.² The remedy by suit would seemingly be gone, as well as that of indictment, because if Congress can provide that criminal proceedings against officers and soldiers for acts done under orders shall take place before a court-martial, they may make a like rule for civil cases, and by stretching the prerogative a little further, enact, as they did in 1862, that "any order of the President, or under his authority, . . . shall be a defence in all courts to any prosecution, civil or military, . . . for any search, seizure, arrest, or imprisonment made, done, or committed by virtue of such order or under color of any law of Congress."

This statute was limited to acts done during the Rebellion; but when rebellion begins or ends, is, under the recent course of legislation, problematical. It is justly said, in Winthrop's Military Law,³ "that as the President, before a war is formally declared or initiated, may be called upon to employ the army in defensive operations," so military government may "legally be continued *bello nondum cessante*, as well as *flagrante bello*."⁴ This citation indicates what the course of events in the United States proves, — that it is easier to provoke a civil war than to restore the confidence without which peace returns but in name. Under these circumstances the reasons which justify martial law subsist, and the vanquished may be held in a military thralldom which is war in disguise. Such were the relations of North and South after the sup-

¹ 2 Cobbett's Parliamentary History, 208, 231, 233; 17 Rushworth, 503, 543, 569, 590.

² See *Ex parte Vallandigham*, 1 Wallace, 243.

³ Vol. ii. p. 19.

⁴ See *Texas v. White*, 7 Wallace, 700, 729; *Dow v. Johnson*, 100 U.S. 168.

pression of the Rebellion, resulting in the reconstruction of the seceding States under corrupt and oppressive governments founded and maintained by the bayonet. The abuses incident to such a system could not be remedied at the polls or by an overt recourse to arms, and led to the formation of secret societies. These, known as the Ku-Klux, resorted to means of intimidation which, although not comparable to much that political discontent and race hostility have prompted in other countries, needed repression. The exigency was thought to require an extreme remedy, going to the verge of the Constitution, and beyond it; and in April, 1871, long after the surrender of the last Confederate army, Congress provided that —

“In all cases where insurrection, domestic violence, unlawful combinations or conspiracies in any State shall so obstruct or hinder the execution of the laws thereof, and of the United States, as to deprive any portion or class of the people of such State of any of the rights, privileges, immunities, or protection, named in the Constitution and secured by this act, and the constituted authorities of such State shall either be unable to protect, or shall, from any cause, fail in or refuse protection of the people in such rights, such facts shall be deemed a denial by such State of the equal protection of the laws to which they are entitled under the Constitution of the United States, and in all such cases, or whenever any such insurrection, violence, unlawful combination, or conspiracy shall oppose or obstruct the laws of the United States or the due execution thereof, or impede or obstruct the due course of justice under the same, it shall be lawful for the President, and it shall be his duty, to take such measures, by the employment of the militia or the land and naval forces of the United States, or of either, or by other means, as he may deem necessary for the suppression of such insurrection, domestic violence, or combinations; and any person who shall be arrested under the provisions of this and the preceding section shall be delivered to the marshal of the proper district, to be dealt with according to law.

“Section 4. That whenever in any State or part of a State the unlawful combinations named in the preceding section of this act shall be organized and armed, and so numerous and powerful as to be able, by violence, to either overthrow or set at defiance the con-

stituted authorities of such State, and of the United States within such State, or when the constituted authorities are in complicity with, or shall connive at the unlawful purposes of, such powerful and armed combinations; and whenever, by reason of either or all of the causes aforesaid, the conviction of such offenders and the preservation of the public safety shall become in such district impracticable, in every such case such combinations shall be deemed a rebellion against the government of the United States; and during the continuance of such rebellion, and within the limits of the district which shall be so under the sway thereof, such limits to be prescribed by proclamation, it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the privileges of the writ of habeas corpus, to the end that such rebellion may be overthrown.”¹

If this act was a legitimate exercise of the powers of Congress, rebellion may be “deemed to exist,” troops employed, and the writ of habeas corpus suspended, whenever unlawful combinations render it hazardous for employers to hire, or workmen to labor, except in accordance with rules which are enforced underhand or overtly by violence, and the constituted authorities are unable or decline to afford the “equal protection of the laws” to the oppressed.

It may be said that confidence in Congress and the President forbids the idea that they will misuse any power that may be placed in their hands; but the Constitution does not rest on such a basis. The restraints which it provides, and

¹ Act of April 20, 1871, chap. 22, sections 3, 4. It was limited to seventeen months from its passage, and was not re-enacted.

Why the “privilege of the writ of habeas corpus” was to be suspended, is not obvious, because the preceding sections of the statute provided for the employment of troops in aid of the civil authorities, and the federal courts were open and in the unimpeded exercise of their functions; but it probably was from the idea that such a suspension is equivalent to a proclamation of martial law. Like most extreme and coercive measures which cannot be carried to the bitter end, the act did not effect its object. The intimidation of colored voters was practised on one side as before, and counteracted on the other by a fraudulent manipulation of the election returns; and the result was the contested Presidential election of 1876. which would have plunged the country in civil war had not the existing generation seen enough of fighting and been anxious to keep the peace.

still more those imposed by the amendments, indicate distrust, not confidence, and should be read in the spirit in which they were drawn. They were dictated by a profound conviction that despotic power will, in the course of events, be abused, and should no more be accorded to a majority than to a king.

We may doubt whether the power to "make rules for the government of the land and naval forces"¹ should receive the broad interpretation suggested in *Coleman v. Tennessee*. What it implies seems to be that Congress may lay down such rules as will conduce to the discipline and efficiency of the army and navy, and enable the President to exercise an effectual control over the officers and men, and not that they may place the soldier beyond the ordinary course of law and deprive the great body of the community of the safeguards of the Constitution by providing that no act done under military authority shall be punishable unless it is so adjudged by a court-martial. An injury inflicted by a soldier on the person or property of a citizen is a breach of discipline, but it is also an offence against the State and federal laws. In the former aspect it may be placed under the cognizance of the military tribunals with advantage, not only to the service, but to the people, as affording a prompt remedy for exactions which might otherwise go unpunished. In the latter it cannot be withdrawn from the jurisdiction of the civil tribunals consistently with fundamental principles. Such has been the common law view from the earliest periods, and there is nothing in the language of the Constitution which indicates an intention to establish a different view.

Were this questionable on the mere wording of the clause, it would seem clear in view of the regard that should be had, in the interpretation of the Constitution, to the principles and maxims which the Colonists brought with them from England and viewed as an inestimable part of their inheritance. Among these was a rooted jealousy of a standing army and a fixed belief that it was incompatible with freedom unless held in strict subordination to the common law.² The hostility of the American people to any interference by the military with

¹ Constitution. Art. 1. sect. 8.

² Federalist. No. viii.

the regular administration of justice in the civil courts was as marked then as it is now ;¹ and they could not have felt otherwise in view of the source from which they sprang. It was with reluctance, and under the compulsion of events, that Parliament came to enact in 1789 that persons who took service in the army should be subject to military law; and a statute exempting them from liability to trial and conviction by a jury would have been summarily rejected, and insured the downfall of the minister who proposed it. Both Houses were in imminent peril from the violence of the mob during the Lord George Gordon riots, and they saw London given up to pillage and in danger of a general conflagration; but the employment of the troops to restore order was severely criticised, and tolerated only on the ground taken by Lord Mansfield, that they were part of the *posse comitatus*, and accountable for what they did in the courts.²

It is therefore a reasonable inference that what the framers of the Constitution intended was to enable Congress to follow the example set by the Mutiny Act, which dates from the accession of the Prince of Orange. Never had the cause of civil and religious liberty been in greater peril. Upheld by a handful of Englishmen, who alone in the civilized world clung to the principles of Magna Charta, it was undermined by Jacobite conspiracies at home and by insurrection in Scotland, and menaced on one side by the Irish Catholics, whose only hope lay in the success of James, and on the other by the military power of Louis XIV. The outlook was a gloomy one, and called even more urgently than did secession and the late Civil War for an efficient exercise of military force and martial law. How to provide for the emergency was not plain, because it was generally conceded that with a standing army liberty would be in danger; without one, it could not be preserved. The dilemma was avoided by a statute which harmonized both views, and having been re-enacted by successive parliaments with little substantial change, is a standing

¹ See *Coleman v. Tennessee*, 97 U. S. 509, 514.

² 21 Cobbett's Parliamentary History, pp. 662, 665, 673, 694: see also 9 Parliamentary History, pp. 1274, 1294.

instance of the statesmanship which strengthens the hands of government without endangering freedom. It opens with a recital that "whereas no man may be forejudged of life or limb, or subjected to any kind of punishment by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm; yet, nevertheless, it is requisite for retaining such forces, as are or shall be raised during this exigence of affairs, in their duty that exact discipline be observed and that soldiers that shall mutiny and stir up sedition, or shall desert her majesty's service, be brought to a more exemplary and speedy punishment than the usual forms of law will allow." The statute, which was originally limited to seven months, and has since been renewed only from year to year, then enumerated certain offences, as mutiny, desertion, etc., which might be visited with death or such other punishment as a court-martial saw fit to inflict, and also authorized the Crown to "frame articles of war, and constitute courts-martial, with power to try any crime by such articles, and inflict penalties by sentence of judgment for the same." The army was thus made subject to military law so long as Parliament should think fit to keep the act alive; but it was at the same time declared, "Nothing in this act contained shall extend or be construed to exempt any officer or soldier whatsoever from the ordinary process of law."¹

An English soldier, consequently, holds a twofold relation, — on one side towards his fellow-citizens outside the army; on the other to his fellow-soldiers as components of the organization to which he belongs. In the former relation he has duties and obligations which may render him liable to severe chastisement for acts that would be trivial on the part of a civilian. In the latter he is subject to all the duties and liabilities imposed by the common and statute law on the people at large, and cannot rely on the orders of his commander as a justification for any act which is contrary to law. So deeply were these ideas imprinted on the English mind that the soldiers who fired on the Boston mob when New

¹ Bl. Com. 415.

England was on the verge of insurrection were tried, not by a court-martial, but by a Boston jury, who responded to the confidence reposed by an acquittal. It is inconceivable that the framers of the Constitution intended to subvert principles which were not less strongly cherished by Americans after the separation from the mother-country than before the declaration of independence, and to authorize an innovation that would enable a general virtually to suspend the constitutional guaranties by issuing illegal orders tending to the deprivation of life, liberty, and property, with no responsibility on his part or that of the officers and men by whom they were executed, save to a court-martial whose members might be bent on the same ends and share his views. Had the germ of such a system been supposed to be latent in the Constitution, it would not have been ratified in a single State. Judges and legislators may, when the occasion requires it, be arbitrarily arrested like meaner men; but the balance should be kept even, by requiring the general to appear in court, when the exigency is over, to justify his conduct. There is little danger of a miscarriage of justice, because the cause may be removed into a circuit court of the United States, and thence on an appeal or writ of error to the federal court of last resort.

The articles of war enacted by Congress in 1775, and again in 1789, after the adoption of the Constitution, were framed on the lines of the Mutiny Act, and could not have gone much beyond them without calling forth general animadversion; and it was not suggested by any one until after the late Civil War that the Constitution conferred any greater power.¹ *Contemporanea expositio est optima*; and in this instance no other is consistent with the letter and spirit of the instrument which conferred the power.

Agreeably to the classification in *Ex parte* Milligan, the next head is military government, which may, as I have already stated, take place whenever a State or province falls into the hands of an enemy. Under these circumstances the

¹ See 1 Winthrop's Military Law, 8, 113; 3 Hallam's Constitutional History of England, 106, 149; 1 Bl. Com. 415.

conquerors may provide for the preservation of order and the maintenance of their power by replacing the existing laws and rulers with a magistracy appointed by themselves and acting under their directions; and the regulations made for this purpose will necessarily be valid until some power arises with the strength to resist. A provisional government was established on this principle by General Kearney in New Mexico in the year 1847, and he not only appointed civil courts for the administration of justice, but prepared the code under which they were to proceed. In *Leitensdorfer v. Webb*¹ and *Cross v. Harrison*² the Supreme Court of the United States viewed this step as a legitimate exercise of the right of conquest, and seem to have thought that the judgments rendered during the continuance of the provisional government remained in force, and might be pleaded as an estoppel after the cession of the province to the United States on the return of peace.

It was determined in like manner, in the case of the "Grapeshot,"³ that the President might, in the exercise of his functions as commander-in-chief, establish provisional courts in Louisiana during the hostile occupation of that State by the forces of the Union, and that the sentence of such a tribunal was conclusive of the matters brought before it for determination, whether arising under the laws of the United States or of the State. A war-tariff was also established at Vera Cruz during the war with Mexico, at the command of the President, and duties collected under it on behalf of the government.⁴ The principle in every such case is that an order given in accordance with the laws of war, by virtue of the conqueror's right to be obeyed, will have the effect of law as to acts done under it while still in force.

The memorable proclamation of Mr. Lincoln, which will always mark an epoch in the history of the United States, may be referred to this principle. The Confederacy had been converted by the act of the inhabitants into hostile territory, and

¹ 20 Howard, 176.

² 16 Howard, 164.

³ 9 Wallace, 129.

⁴ See 1 Kent's Com. (10th ed.) 92, note b, where the constitutionality of such an exercise of power is treated as questionable.

the slaves which it contained were either property or persons. If property, they might be taken from the enemy by capture; if persons, summoned to take part against him and with the government with which he was at war. The United States might therefore follow the example set by England during the Revolutionary War, which, though treated as a grievance in the Declaration of Independence, may be regarded as a legitimate exercise of belligerent rights. In one aspect the proclamation was an order to the land and naval forces of the United States to seize the slaves of the insurgents as prize of war; in another, it was an invitation to the disaffected subjects of a belligerent to throw off the yoke and join the invading army. Being a mere command, which wanted the force and effect of law, it could work no change in the legal status of the slave until executed by the hand of war; but if carried into execution it might, like other acts done *jure belli*, work a change that would survive on the return of peace. The slaves which came into the possession of the United States during the war may have owed their freedom to the proclamation; but it was wholly inoperative as to those who, remaining under the control and dominion of their masters, were finally liberated by the amendment abolishing slavery in the United States.¹

It is not easy to say how far the authority of a commanding officer over property extends during insurrection or invasion, but it clearly should not be exercised for the purpose of punishment, nor except in the course of warlike operations, or as a means of strengthening himself or weakening the

¹ Like the codes above referred to, the proclamation was an order; but a standing-order does not differ from a law except that the authority from which it proceeds is ordinarily transitory, and cannot lay down permanent rules. Giving full effect to the President's command and to the principle on which alone it can be sustained, it did not warrant uncompensated emancipation in Kentucky, whose forces steadfastly upheld the Union, and might, if arrayed on the other side, have turned the scales in favor of secession. The wrong of slavery was common to the whole country, and magnanimity not less than justice required that all should share the cost of compensating every slaveholder who did not actually or constructively participate in the Rebellion.

enemy.¹ As was said in *Mrs. Alexander's case* and reiterated in *Young v. United States*, "the right" (of capture or confiscation) "may now be regarded as substantially restricted to especial cases dictated by the necessary operations of the war, and as excluding in general the seizure of private property of specific persons for the sake of gain."²

The modern commentators on international law, including Kent and Hamilton, hold, for still stronger reasons, that debts, choses in action, and other property which has been brought into a country or acquired there during peace, cannot be confiscated on the occurrence of war consistently with the good faith which should be observed among nations; and the just inference from the authorities as a whole is that while the power must necessarily exist, unless it is withheld by the organic law, it can rarely be exercised without producing a distrust which will outweigh the temporary gain.³

In the case of the *Emulous*, Story, J., said, referring to Hamilton's articles under the signature of Camillus: "I have been impressed with the opinion of a very distinguished writer of our own country on this subject. I admit in the fullest manner the great merit of the argument which he has adduced against the confiscation of private debts due to enemy subjects. Looking to the measure, not as of strict right, but of sound policy and national honor, I have no hesitation to say that the argument is unanswerable. He proves incontrovertibly what the highest interests of nations dictate with a view to permanent policy. But I have not been

¹ Kent's Com., Lecture V.; p. 92, *Mrs. Alexander's Cotton*, 2 Wallace, 404; *United States v. Padelford*, 9 Id. 531; *Young v. United States*, 97 U. S. 39, 59.

² Cotton justly became an exception to the rule during the late civil war, because it was impressed by the Confederate Government and sent through blockade-runners as a means of purchasing arms and warlike stores. *Mrs. Alexander's Cotton*, 2 Wallace, 404; *United States v. Padelford*, 9 Id. 531.

³ The *Emulous*, 1 Gallison, 565, 577, 579; *Brown v. United States*, 8 Cranch, 110; Wheaton's *International Law* (by Dana), p. 391. See Hamilton's articles under the signature of Camillus, Nos. 13-23, in defence of Jay's treaty.

able to perceive the proofs by which he overthrows the ancient principle."¹

The right is political rather than *ex jure belli*, and depends on the discretion of the government. Property within the limits of the United States is under the protection of the law even when it belongs to an enemy, and cannot, agreeably to the rule laid down in *Brown v. United States*, be taken by an individual as prize of war, or confiscated judicially, without the sanction of an act of Congress. If no such law is passed, the title of the owner remains unaffected, and may be asserted on the return of peace.²

It was, notwithstanding, decided in *Gates v. Goodlow*³ that the general in command of the district of Tennessee during the civil war, might well direct the tenants of buildings in Memphis belonging to persons who had left that city on the approach of the national forces and "gone South," to pay their rents to the officer whom he appointed as receiver, and that the order was a defence to a suit brought by the landlord after the cessation of hostilities, because the tenant might have been evicted for a refusal to obey. Obviously punishment could not be inflicted where there was no conviction under the civil, or breach of the military law; and the decision was put on the ground that the property of the inhabitants of a hostile territory may be taken wherever found, as a means of distressing the enemy and to aid in the prosecution of the war. The court held that it is the duty of a citizen when war breaks out and he is abroad, to return without delay; and if it be a civil war, and he is a resident of the rebellious section, he should leave it as soon as possible, and adhere to the regularly established government. If he remains, he must be ranked with the enemies among whom he has fixed his abode. These propositions are no doubt abstractly true; but it is often morally and physically impossible to follow the rule which they lay down, and property ought not to be confiscated for a failure to comply where there is no other cause. Were Germany or England to adopt such a measure on the

¹ 1 Gall. 577. See *Miller v. The United States*, 11 Wallace, 268.

² Kent's Com., Lecture III., p. 60.

³ 101 U. S. 612.

occurrence of hostilities with regard to the millions of their subjects who are domiciled in the United States, it would be generally censured as extreme. Civilization and humanity require that private property should not be taken or destroyed except on the ground of necessity, or where there is reason to apprehend that it will come into the possession of the enemy. No such cause can well exist with regard to money due to persons who inhabit a hostile territory, because it cannot lawfully be paid until the return of peace, and the interests of the debtors is a sufficient guaranty that the rule will be observed.¹

The doctrine of military government may readily be applied in a foreign war, but it is attended with more difficulty when the conquered territory is a part of the United States. It is well settled that a civil or domestic war will, during its continuance, confer all the rights and be attended by all the incidents of a war between distinct and independent nations. One object of military government is to render the hold of the conqueror secure, and enable him to set the seal on his success ; and it must, therefore, in common with every other recognized means of war, be at the command of a legitimate government endeavoring to subdue an insurrection. As the army advances into the rebellious territory a hostile may be replaced by a loyal magistracy, and a provisional government established to preserve order and administer justice until the courts can be reopened on the return of peace. The difficulty is that as such a war is not prosecuted with a view to conquest, but to restore the normal condition which the rebellion interrupts, the right to employ force may be thought to cease with the termination of hostilities. It must still, however, be in the discretion of the government to determine when the war is at an end, and whether the insurgents are sincere in laying down their arms, or intend to renew the contest at the first favorable opportunity ; and while this uncertainty continues, military government and occupation may be prolonged on the ground of necessity. If the governments established by these means and under the operation of the

¹ See *Mitchell v. Clark*, 110 U. S. 633. See *post*, p. 972.

Reconstruction Acts were weak, corrupt, and ruinous, and tended to discord rather than reconciliation, it does not affect the case viewed as a question of military jurisprudence.

We have seen that a court-martial ordinarily has no jurisdiction over murder, robbery, and other offences against the law of the land, even when committed by or against a soldier or officer of the United States, except for the maintenance of discipline and by virtue of the rules established for that end in the articles of war, and that the criminal must be given up to the civil authorities for trial in the ordinary course of law.¹ When, however, the crime is committed while the army is engaged in the prosecution of a campaign beyond the limits of the United States, or in a revolted district where the courts are closed, a court-martial may, from the necessity of the case and the want of any other remedy, have exclusive cognizance of offences of this description, although their authority is under these circumstances rather an exercise of martial law than of military government in the strict sense of the term.²

¹ See *ante*, p. 938.

² *Coleman v. Tennessee*, 97 U. S. 513.

After the accession of William and Mary a standing army being found necessary, Parliament retained the control of it by establishing it for only a year at a time, and these annual acts first made mutiny and desertion punishable at the sentence of a court-martial in time of peace, and are therefore known as the Mutiny Acts. The earliest of these was limited to persons "being in their Majesties' service in the army, and being mustered and in pay as an officer or soldier." St. 1 W. & M. c. 5, sect. 2. This clause was re-enacted in the same form, thus requiring both mustering and pay to constitute the military character, until early in the following reign, when either was made sufficient, and the act extended to "every person being in her Majesty's service in the army, or mustered or in pay as an officer, or listed or in pay as a soldier." Sts. 6 Anne, c. 18 (often cited as 5 & 6 Anne, c. 16), sect. 2; 7 Anne, c. 4. But within five years after the passage of the first Mutiny Act a section was inserted providing that no person should be "esteemed a listed soldier, or be subject to any of the pains or penalties of this act, or any other penalty for his behavior as a soldier" unless he should before a civil magistrate "declare his free consent to be listed or mustered as a soldier, before he should be listed or mustered or inserted on any muster-roll of a regiment, troop, or company." St. 5 & 6 W. & M. c. 15, sect. 2.

And the law of England has since by similar provisions required either enlistment by a military officer, with full opportunity to reconsider and retract in the case of a soldier, or actually being mustered or commissioned in the case of an officer, to subject either to military discipline; allowing, however, the alternative of being in pay, to avoid the necessity of discussing the nature of the engagement or mode of contracting it. See *Methuen v. Martin*, Sayer, 107; *Grant v. Gould*, 2 H. Bl. 103, 104; 1 *McArthur on Courts Martial*, 195, 196; *Bradley v. Arthur*, 4 B. & C. 308; *Wolton v. Gavin*, 16 Q. B. 48; *Thomson's Military Forces of Great Britain*, 92 *et seq.* That the original enlistment of a recruit, or payment of money to him, must be made by some person having the necessary military authority, in order to justify forcibly restraining him, is shown by the case in which a drummer, who had no lawful power to enlist recruits, upon being urged by a man to enlist him, gave him a shilling for that purpose; the man afterwards attempted to escape, and was opposed by the drummer and a private soldier with him, and the latter stabbed one who was assisting the escape, and the twelve judges held that he was liable to indictment for wilful stabbing. *Rex v. Longden*, Russ. & Ry. 228. The Articles of War, reported by a committee of which Adams and Jefferson were members, and established by the Congress of the Confederation in 1776, within three months after the Declaration of American Independence, substantially adopted the provisions of the English Mutiny Acts, and required every recruit to be enlisted by a military officer and taken before a civil magistrate and there have the Articles of War read to him, and take the oath of allegiance and service; yet allowed the receipt of pay from the Government to be conclusive evidence of enlistment, and declared that "all officers and soldiers who, having received pay, or having been duly enlisted in the service of the United States, shall be convicted of having deserted the same, shall suffer death or such other punishment as by sentence of a court-martial shall be inflicted;" and that these articles "are to be read every two months at the head of every regiment, troop or company, mustered or to be mustered in the service of the United States, and are to be duly observed and exactly obeyed by all officers and soldiers who are or shall be in the said service." Articles of War of September 20, 1776, sect. 3, art. 1; sect. 6, art. 1; sect. 18, art. 1. 2 *Journals of Congress*, 367, 369, 380. 3 *John Adams's Works*, 83, 84. After all powers of war and peace had been granted by the Constitution to the National Government, the Congress of the United States established similar articles. U. S. St. 1806, c. 20, arts. 10, 20, 101, 2 U. S. Sts. at Large, 361, 362, 371. The oath was permitted by the statute of 1806, to be taken before the Judge Advocate, and by the statute of 1861, c. 42, sec. 11, before any commissioned officer of the army. 12 U. S. Sts. at Large, 289. Taking the recruit before the civil magistrate is thus dispensed with, but his engagement with a military officer is essential.

In addition to the power to raise, support, and regulate armies, Congress is vested by the Constitution with authority to provide for organizing, arming, and disciplining the militia, for calling them into the service of the United States to execute the laws of the Union, to suppress insurrections and repel invasions, and for governing them when employed in the national service. Under this power to organize, Congress has the exclusive power of determining who shall constitute the militia; and all persons coming within the class defined by Congress are members of the militia without any act of their own. *Opinion of Justices*, 14 Gray, 614. *Commonwealth v. Cushing*, 11 Mass. 71. *Whitmore v. Sanborn*, 8 Greenl. 310. U. S. St. 1862, c. 201, 12 U. S. Sts. at Large, 507. Signing an enlistment list is not required to make them militia, and does no more than ascertain the particular company in which they shall serve, and perhaps estop the signers to claim exemption afterwards. Decisions or statutes, like those cited by the defendants, that such a signing is evidence of enlistment in a volunteer militia company, have therefore no bearing upon the question of what constitutes a soldier of the United States. *Bullen v. Baker*, 8 Greenl. 391. Gen. Sts. c. 13, sect. 18. A nearer analogy may be found in the entry of the militia into the service of the Union when called out by Congress. This is well settled by the decisions of the Supreme Court of the United States to be upon their arrival at the place of rendezvous, and not before. *Houston v. Moore*, 5 Wheat. 20, 36, 53, 61. *Martin v. Mott*, 12 Wheat. 15. Some of the reasons given by the justices apply with great force to the case before us. "The arrival of the militia at the place of rendezvous," said Mr. Justice Washington, "is the *terminus a quo* the service, the pay, and subjection to the articles of war are to commence and continue. If the service, in particular, is to continue for a certain length of time from a certain day, it would seem to follow almost conclusively that the service commenced on that and not on some prior day." 5 Wheat. 20. Mr. Justice Story added: "It would seem almost absurd to say that those men, who have performed no actual service, are yet to receive pay; that they are 'employed' when they refuse to be employed in the public service; that they are 'acting' in conjunction with the regular forces or otherwise, when they are not embodied to act at all, or that they are subject to the Articles of War as troops organized and employed in the public service, when they have utterly disclaimed all military organization and obedience. There are the strongest reasons to believe that by employment 'in the service,' or, as it is sometimes expressed, 'in the actual service' of the United States, something more must be done than a mere calling for of the militia; that it includes some act of organization, mustering or marching, done or recognized." *Id.* 63.

Attorney-General Legare, in an opinion to the Secretary of War in 1841, on the payment of the Florida militia, expressed like views, saying: "It is only when called out into actual service that the militia are sub-

jected to the exclusive control of the Federal authorities. Until detachments from it have been actually mustered to be subjected in a solemn and authentic form to the Articles of War, as in the parallel case of voluntary enlistment, the body of the people, armed and disciplined in self-defence (for that is the definition of the militia), stand in all respects upon the same footing as in any other of their great political relations. Nor will anything short of this formal dedication, so to express it, of portions of it to military responsibilities, and actual embodying of them into masses, under the rules and regulations of war, constitute them a part of the Federal army. 3 Opinions of Attorneys-General, 691." *Tyler v. Pomeroy*, 8 Allen, 485.

In this instance the plaintiff, who had signed a written agreement to enter the military service of the United States, was arrested as a deserter by the selectmen of the town of Washington, acting as recruiting officers for the United States, taken to the guard-house and there confined; and the Court held that he was entitled to damages.

Whatever the rule may be as to voluntary enlistments, Congress may provide that a drafted man shall be under military law and liable to punishment as a deserter, as soon as the ballot is drawn which renders him a conscript and makes it his duty to be present at the rendezvous at the time prescribed by law. See *Houston v. Moore*, 5 Wheaton; *Kessler v. Lane*, 45 Pa. 238, 281; *In re Spangler*, 13 Mich. 298; *Antrim's Case*, 5 Phila. 278.

LECTURE XLIV.

Martial Law in England, France, and the United States. — It Grows out of and is Limited by Necessity. — The Validity and Statutory Effect of a Declaration of Martial Law. — Views taken on this head in *Ex parte Milligan*. — A State may equally with the United States employ its Military Force against Insurgents and hold them as Prisoners of War. — Can Congress render the President a Dictator, or provide that acts done under color of authority from him shall not be Trespasses? Is a Causeless Military Order a justification for a Trespass or a breach of Contract? — Courts-Martial and Military Commissions; their rapid growth and extension in the United States. — Should the Prosecutor select the Judges?

WE have still to consider martial law. As a distinct and separate head of jurisdiction, it is unknown to the common law, which lies at the foundation of English and American jurisprudence and is intolerant of arbitrary power.¹ The common law nevertheless recognizes the doctrine of necessity, and will hold every act justifiable which is essential to the preservation of property and life. If this is true where individuals are in question, it applies *a fortiori* when the country is menaced with invasion, or an attempt is made forcibly to overthrow the government on which the welfare of all depends.² Under these circumstances force must be repelled by force; and everything will be lawful which is necessary to render the use of force effectual. Property may accordingly be destroyed to prevent it from falling into the hands of the enemy, or seized and applied to public use if there are no other

¹ *Grant v. Gould*, 2 H. Blackstone, 69, 86, 101; Dicey, *Law of the Constitution*, 297. See *ante*, pp 910, 921.

² Dicey, *Law of the Constitution*, 297.

means at hand and the necessity is urgent.¹ It may, moreover, in a case of imminent peril, be lawful to place a town or district in the hands of the military authorities, and subject the whole population absolutely for the time being to their orders.² Fields may under these circumstances be occupied for fortifications, houses that would facilitate the approach of the enemy razed, and men and animals pressed into the service and compelled to labor in erecting redoubts and breast-works.³ And it may be requisite, by a further and still greater stretch of authority, to prevent insurrection by the arrest of suspected individuals and holding them in custody until the enemy is repelled; or they may be brought to trial before a court-martial if the exigency does not admit of delay.⁴

But these steps must be taken, not against the law, but under it, and subject to the obligation of rendering an account before a judge and jury when the courts can be reopened and the ordinary course of justice resumed. *Prima facie*, every such act is a trespass which can only be justified by proving that the circumstances were such as to render it the duty of the commanding officer to disregard the rights of individuals in view of the public safety. To this extent martial law is a part of the Constitution and laws of the United States; and the cases of *Mitchell v. Harmony*⁵ and *Ex parte Milligan*⁶ establish that it cannot be carried further even by the occurrence of war and the authority of an act of Congress. The right and duty of a commander to do whatever is necessary to repel the enemy, repress sedition, and maintain his post, are thus made reconcilable with the genius of a free government, because his conduct may be brought to the test of a judicial inquiry, and punishment inflicted, or a

¹ *Respublica v. Sparhawk*, 1 Dallas, 357; *Mitchell v. Harmony*, 13 Howard, 115. See *ante*, pp. 910, 918.

² *Luther v. Borden*, 7 Howard, 146.

³ See *The King's Prerogative in Saltpetre*, 12 Coke, 63; *ante*, p. 908.

⁴ *Ex parte Milligan*, 4 Wallace, 121, 127.

⁵ 13 Howard, 115.

⁶ 4 Wallace, 121, 127.

recovery had in damages if he went further than the occasion imperatively demanded. Such a method is essentially different from that which in France prepares the way for despotism by accustoming the nation to the idea that an ordinance or proclamation may supersede the civil tribunals and render the order of a superior officer a justification for any measure, however extreme, whether it is or is not warranted by the circumstances. What martial law as thus interpreted signifies, may be gathered from the legislation of Congress during the civil war, and from the following extract from the code which regulates the French *état de siège*, as cited by Mr. Dicey¹: —

“ Aussitôt l'état de siège déclaré, les pouvoirs dont l'autorité civile était revêtue pour le maintien de l'ordre et de la police passent tout entiers à l'autorité militaire. L'autorité civile continue néanmoins à exercer ceux de ces pouvoirs dont l'autorité militaire ne l'a pas dessaisie.

“ 8. Les tribunaux militaires peuvent être saisis de la connaissance des crimes et délits contre la sûreté de la République, contre la constitution, contre l'ordre et la paix publique, quelle que soit la qualité des auteurs principaux et des complices.

“ 9. L'autorité militaire a le droit, — (1) De faire des perquisitions, de jour et de nuit, dans les domiciles des citoyens. (2) D'éloigner les repris de justice et les individus qui n'ont pas leur domicile dans les lieux soumis à l'état de siège. (3) D'ordonner la remise des armes et munitions, et de procéder à leur recherche et à leur enlèvement. (4) D'interdire les publications et les réunions qu'elle juge de nature à exciter ou à entretenir le désordre.”

Mr. Dicey, in commenting on these provisions, remarks as follows: —

“ We may reasonably conjecture that the terms of the law give but a faint conception of the real condition of affairs when, in consequence of tumult or insurrection, Paris or some other part of France is declared in a state of siege, and, to use a significant expression known to some Continental countries, ‘the constitutional guaranties are suspended.’ We shall hardly go far wrong if we assume that

¹ Dicey, *Law of the Constitution*, 381. See *Mitchell v. Clark*, 110 U. S. 633.

during this suspension of ordinary law any man whatever is liable to arrest, imprisonment, or execution at the will of a military tribunal consisting of a few officers who are excited by the passions natural to civil war.

“Now, this kind of martial law is in England utterly unknown to the Constitution. Soldiers may suppress a riot as they may resist an invasion; they may fight rebels just as they might fight foreign enemies; but they have no right, under the law, to inflict punishment for riot or rebellion. During the effort to restore peace rebels may be lawfully killed, just as enemies may be lawfully slaughtered in battle, or prisoners may be shot to prevent their escape; but any execution, independently of military law, inflicted by a court-martial is illegal, and technically murder. Nothing better illustrates the noble energy with which judges have maintained the rule of regular law, even at periods of revolutionary violence, than Wolfe Tone’s case. In 1798 Wolfe Tone, an Irish rebel, took part in a French invasion of Ireland. The man-of-war in which he sailed was captured, and Wolfe Tone was brought to trial before a court-martial in Dublin. He was thereupon sentenced to be hanged. He held, however, no commission as an English officer, his only commission being one from the French Republic. On the morning when his execution was about to take place, application was made to the Irish King’s Bench for a writ of habeas corpus. The ground taken was that Wolfe Tone, not being a military person, was not subject to punishment by a court-martial, or, in fact, that the officers who tried him were attempting illegally to enforce martial law. The Court of the King’s Bench at once granted the writ. When it is remembered that Wolfe Tone’s substantial guilt was admitted, that the court was filled with judges who detested the rebels, and that in 1798 Ireland was in the midst of a revolutionary crisis, it will be admitted that no more splendid assertion of the supremacy of law can be found than that then made by the Irish Bench.”

The question whether the principle of Magna Charta as declared in the Petition of Right, vindicated by the Declaration of Independence, and guaranteed by the Constitution of the United States, shall give place in this regard to the methods which have been despotically introduced on the continent of Europe, arose in *Ex parte* Milligan, where the wavering balance fortunately inclined to the side of free-

dom, although with a tendency to oscillate which leaves the ultimate result in doubt.¹

The petitioner Milligan was tried by a court-martial in Indiana shortly before the capture of Richmond, and sentenced to death on the charge of being a member of a secret society for the purpose of overthrowing the government of the United States, of holding communication with the enemy, and of conspiring to seize munitions of war and resist the draft. At the time of the trial and condemnation the courts of the United States were open in Indiana, and there was no pretence that the accused was a prisoner of war or had actually participated in the Rebellion. His offence, if he was guilty, was treason or a criminal conspiracy, and not against the laws of war. The point before the court was whether a court-martial has jurisdiction under such circumstances to try, convict, and execute a citizen; and was decided in favor of the common law, contrary to the opinion of the Chief-Justice and three of the associate justices. Agreeably to the judgment as delivered by Mr. Justice Davis, the right of trial by jury, according to the course of law, was secured to the citizen by the Constitution. It had, however, been contended that in a time of war a commander might, if in his opinion the exigency of the case required it, suspend all civil rights and their remedies within the lines of his military district, and could not be restrained in the exercise of this authority except by his superior officer, the President of the United States. If this proposition was sound, the occurrence of hostilities converted the government into a military despotism. Happily it was not sound. Martial law could only arise from an actual and present peril which effectually closed the courts and deposed the civil administration. If during foreign invasion or civil war the courts were actually closed and it became impossible to administer justice according to law, then on the theatre where war really prevailed there was a necessity to furnish a substitute for the civil authority which had been overthrown; and as the only remaining power was the military, it was allowed to govern until the laws could again have

¹ See *Mitchell v. Clark*, 110 U. S. 633.

their free and unobstructed course. As necessity created the rule, so it limited its duration; and military government could not be continued after the courts were reinstated, without a gross usurpation of power. Martial rule could never exist where the courts were open and in the proper and unobstructed exercise of their functions. It was also confined to the locality of actual war; and it was erroneous to imagine that because it was properly enforced during the Rebellion in Virginia, where the national authority was overturned and the federal tribunals silenced or expelled, it could obtain in Indiana, where that authority was never disputed, and justice took its accustomed way. And so in the case of a foreign invasion, martial law might be a necessity in one State when it would be mere lawless violence in another.

These principles were established in England under Magna Charta, and Parliament had as far back as the first year of the reign of Edward III., in reversing the attainder of the Earl of Lancaster because he could have been tried by the courts of the realm, declared "that in time of peace no man ought to be adjudged to death for treason or any other offence without being arraigned and held to answer, and that regularly when the king's courts are open it is a time of peace and for legal judgment." From that period down to our own times the right to exercise martial law on any other ground than that of actual and imminent peril was condemned by all English jurists of reputation as contrary to the fundamental laws of the land and subversive of the liberties of the subject.

The founders of the Republic had been equally clear that arbitrary power, either in peace or war, and in war even more than in peace, was hostile to the freedom of a republic. They had consequently provided certain safeguards which were clearly written in the Constitution. The provisions of that instrument were too plain and direct to leave room for misconstruction or admit a doubt as to their true meaning. It declared that the trial of all crimes, except in case of impeachment, should be by jury; and additional guaranties were given by the Fourth, Fifth, and Sixth Articles of Amend-

ment. The Fourth proclaimed the right of the citizen to be secure in his person and effects against unreasonable search and seizure, and directed that a warrant should not issue without proof or probable cause, supported by oath or affirmation. The Fifth declared that no person should be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia when in service in time of war or actual danger; nor should any person be deprived of life, liberty, or property without due process of law. The right to a trial by a jury was still further fortified by the Sixth Amendment, which provided that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district where the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." Time had shown the discernment of our ancestors; for even these provisions, expressed in such plain English words that they could not be misunderstood, were now, after the lapse of more than seventy years, sought to be evaded. Milligan had not been mustered into the service of the United States, he was not a prisoner of war, it was not alleged that any overruling necessity existed precluding the action of the civil courts and justifying a recourse to martial law. On the contrary, soon after the military tribunal which convicted him adjourned, the circuit court of the United States sat in the same building and peacefully transacted its business. There was consequently no justification for denying him the trial before a jury and in the due course of law which the Constitution expressly secured. The writ of habeas corpus had, it was true, been suspended by the President and Congress. This was the only safeguard for personal freedom that could be withheld by the President or by Congress, even in time of war. The sole effect of such a suspension is to enable the government to hold the persons

whom it has arrested until they can be brought before a court and jury, consistently with the public safety. The Constitution goes no farther. It does not say that when the writ of habeas corpus is temporarily withdrawn, the citizen may be tried and executed by martial law.

Such was the decision of the majority of the court; the minority, consisting of the Chief-Justice and of Wayne, Miller, and Swayne, JJ., arrived at the same conclusion, but on different grounds. In their opinion, as delivered by the Chief-Justice, the prisoner must be discharged, because the act which authorized the suspension of the habeas corpus also provided that lists of all persons being citizens of States in which the administration of the laws remained unimpaired in the federal courts, and who were then held, or who might be thereafter held, as prisoners of the United States under the authority of the President, otherwise than as prisoners of war, should be furnished to the judges of the circuit and district courts. These lists were to contain the names of every one residing within the respective jurisdictions charged with a violation of the national laws; and it was further required, in cases where the grand jury in attendance upon any of the said courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the court should forthwith make an order that such person should be brought before them and be discharged. The petitioner's case was within the precise letter and intent of the act, unless it could be said that he was not imprisoned by authority of the President; and no such allegation had been made on behalf of the government.

The Chief-Justice and the judges who agreed with him were, however, unable to concur with the majority of the court that the military commission held in Indiana was not only unauthorized by Congress, but that it was not in the power of Congress to authorize it, and were, on the contrary, of opinion that Congress might establish martial law or authorize the trial of citizens by a military tribunal in any part of the Union in time of war; or if such acts were done without their authority, might ratify them afterwards, and

shield the officers who composed the commission from liability to the courts of common law. As they contended, the suspension of the habeas corpus authorized the President to arrest, as well as to detain, and might justify a trial and conviction by a military commission in States where the civil courts were still open. The Constitution provided for military government as well as civil government; and the civil safeguards of the Constitution did not apply in cases within the proper sphere of military government. Congress had power to raise and support armies, to make rules for the government of the land and naval forces, and to provide for the government of such part of the militia as might be in the service of the United States. This power was not abridged by the Fifth or any other amendment. It was not necessary to attempt any precise definition of the boundaries within which it was confined; but cases might easily be imagined where citizens conspiring or attempting the destruction of the national forces might be subjected by Congress to military trial and punishment in the just exercise of this undoubted constitutional power. But this was not the only foundation of the right of Congress to authorize such a military commission as had been held in Indiana. They had the power not only to raise and govern armies, but to declare war. They had therefore the power to provide by law for carrying on war. This power necessarily extended to all legislation essential to the prosecution of war with vigor and success, and that did not interfere with the command of the forces and the conduct of campaigns. Congress could not plan a campaign, nor could the President, or any commander under him, institute tribunals for the trial of soldiers or civilians, unless there was a controlling necessity which justified what it compelled, or would call for an act of indemnity from the justice of the legislature.

It was not meant to assert that Congress could establish and apply the laws of war when war had not been declared or did not exist. The contention was that when the nation was involved in war, when some portions of the country were invaded, and all might be assailed, it was within the

power of Congress to determine in what States and districts such imminent public danger existed as to justify the establishment of military tribunals for the trials of crimes and offences against the discipline or security of the army or against the public safety. It could not be doubted that in such a time of public danger Congress had power under the Constitution to provide for the organization of a military commission, and for the trial by that commission of persons engaged in a conspiracy to aid the enemy and against the government. That the federal courts were open, might be a reason why Congress should not exercise the power, but could not deprive Congress of the right to exercise it. Those courts might discharge their functions freely and without disturbance, and yet be wholly incompetent to avert the threatened danger and punish the conspirators with promptitude and certainty.

We may regret that the court should have been divided on a subject of so much importance; but the opinion of the majority would seem to be in entire conformity with the letter and spirit of the Constitution. There is nothing in that instrument to indicate that the guaranties which it affords for life or property are to cease on the occurrence of hostilities. A contrary design is manifested unmistakably with the utmost clearness.¹

“The trial of all crimes, except in cases of impeachment, shall be by jury.” Such is the explicit language of the Constitution (Art. III. sect. 2). The Fourth Amendment guarantees the right of the people to be secure in their persons, papers, houses, and effects against unreasonable searches and seizures, and that no warrant shall issue except upon probable cause, supported by oath or affirmation. By the Fifth Amendment “no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia when in actual service, in time of war or public danger, nor shall any person . . . be deprived of life, liberty, or property without

¹ See *Luther v. Borden*, 6 Howard, 167; *ante*, pp. 121, 507, 862.

due process of law." That there may be no room for mistake or evasion, the Sixth Amendment reiterates and enforces the constitutional provision by a declaration that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury within the State wherein the crime shall have been committed. These provisions — save in two particulars, which will be presently adverted to — are absolute, without let or qualification. If the intention had been to restrict them to seasons of peace, it would have been so stated. This is not left to inference, but appears from the exception of "cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." The power which the minority of the court treated as extending to all persons is consequently denied in terms as to all persons who are not in the army or navy, or militiamen in actual service. So the final clause of the provision with regard to the habeas corpus which reverses the action of the first by declaring in effect that the writ may be suspended during insurrection or invasion, would not have been added by men who knew that they had given an authority under which that writ and every other security for freedom might be set aside during war. By providing that a particular remedy may be suspended in the case of extreme and urgent peril, the Constitution plainly indicates that all other remedies are to remain in full force and virtue. This does not conflict with the rule that the means necessary to repel the enemy or subdue an insurrection may be employed, although they involve a deprivation of the rights of the citizen; for under these circumstances the act is done, not under a despotic and irresponsible power conferred by statute, but by virtue of an authority growing out of the circumstances, that may be tested by the common law.

In saying that martial law cannot arise from a threatened invasion, Mr. Justice Davis may have gone too far, and unduly limited the right of the military authorities to provide for the safety of the community. Nothing short of necessity can justify a recourse to martial law; but such a necessity

may exist before the blow actually falls. An army assembled in Canada might necessitate extraordinary measures of precaution on the northern frontier, although no hostile force had crossed the line. So the able-bodied population of Philadelphia might have been forcibly enrolled to provide for the defence of the city in the summer of 1863 while Lee's army was still in Maryland and before he entered Pennsylvania. All that can be said with certainty is that there must be reasonable and probable cause for believing in the imminency of a peril that suspends the ordinary rules, which must be determined at the time by the commander, but may be reconsidered subsequently by a court and jury, who will rarely look unfavorably on any man who at a critical period has acted in good faith for the protection of the community.¹ Whatever may be thought on this point, there is every reason for holding, with the majority of the court, that when necessity gives the right, legislation is superfluous; when it does not, the right cannot be conferred legislatively by Congress.

If we now turn to the opinion of the minority, it will be found contrary to the books of the common law, and at variance with the plain English words of the Constitution and Amendments. Seldom has a broader superstructure been raised on a narrower basis. The argument may deserve the praise of ingenuity, and will probably be cited whenever a dominant party is in want of reasons for the exercise of arbitrary power. Congress may make rules and regulations for the government of the land and naval forces, and of militiamen when in actual service; therefore Congress may place persons who do not belong to the land and naval forces, and who are not enrolled or serving, under military government. Certain persons — namely, soldiers, sailors, and militiamen mustered into the service of the United States — are excepted from the operation of the Fifth Amendment; therefore all persons may, during insurrection or invasion, be denied the benefit of that amendment. The army may be

¹ In no instance, so far as I am aware, has an English or American jury allowed an officer or soldier to suffer for acts done with any shadow of right to repel invasion or quell a mob.

so constituted and organized as to defend the citizen; consequently the army may be authorized to try and execute the citizen. In other words, an authority to forge a weapon for my protection is an authority to turn the weapon against me.

The Chief-Justice can hardly be said to have been more successful in the effort to deduce the right to arrest and execute summarily, without sufficient cause shown by oath or affirmation, or a trial by jury, from the authority to declare war and suspend the writ of habeas corpus. The suspension of the habeas corpus does not authorize the President to make arrests. His authority in this regard is derived from his office as chief magistrate and the obligation to take care that the laws be faithfully executed. From whatever source such an authority may come, it must be exercised in conformity with the Fourth Amendment — that no warrant shall issue but upon probable cause, supported by oath or affirmation — and the doctrine of the common law that the cause must be set forth in the writ, unless there is the necessity for immediate action which justifies a constable in apprehending without a warrant or a complaint under oath before a magistrate.¹ To contend that the suspension of a single guaranty authorizes a disregard of every other, is an abuse of terms.²

¹ See *ante*, pp. 784, 909.

² Oppressive as the suspension of the habeas corpus act seems to have been in 1817 in England, it was shown by the report of the committee appointed by the House of Lords that no one had been arrested except on information given under oath, and none on the evidence of informers without corroboration by other undoubted testimony. 2 May's Const. Hist. 269.

It is to the idea that when the writ of habeas corpus is suspended all the forms of law are gone, and men may be imprisoned on suspicion, or the denunciations of informers, that we may ascribe the numerous arbitrary arrests under Mr. Lincoln's administration. There certainly never was a time when the life of a nation was in greater peril, or when the measures adopted for its preservation should be more leniently judged. But there is little doubt that the disregard shown for individual rights tended to discredit a cause which had as its watchword that no man should be held in bondage except for some definite cause, established in due course of law. It would be too much to affirm that all the arrests then made were groundless. But few persons who knew the temper of the people will deny that

Still less can a charter for an unlimited authority in Congress be found in the right to declare war. Such a declaration carries with it a right to use all the means that are incident to war as defined by the law of nations, and Congress cannot enlarge the power or authorize any act which is contrary to the Constitution as amended. War may come into existence through their fiat, but it is for the judiciary to say how far it enlarges the authority of the army over the citizen, or warrants the deprivation of life, liberty, or property without due process of law. If exigencies occur in the course of warlike operations which cannot be met without the exercise of military force over persons who are not in the military or naval service, or in arms against the United States, the commander must take the responsibility of deciding what the necessity requires, with a just confidence that his conduct will not be viewed with an unfavorable eye should the case subsequently be brought into court. Such a subordination of the military to the civil power leaves the hands of the general free, without exonerating him from responsibility, and, as English history proves, is not incompatible with a victorious exercise of force against foreign and domestic enemies. It was resolutely maintained during the season of extreme peril that followed the Revolution of 1688, and is guaranteed by the amendments of the Constitution of the United States; and there is nothing in the teachings of experience to warrant the belief that it should be laid aside, or that a nation cannot defend itself without being placed under despotic rule.

If the view taken in these pages is correct, martial law as it exists and may be enforced in the United States is as much a part of the common or municipal law, as the authority of the sheriff to use forcible measures for the suppression of a riot, or that of the mayor of a town to destroy a building in order to arrest the spread of a conflagration. The civil courts may remain open, and successfully administer justice in a besieged

many of them were frivolous, and tended to alienate the friends rather than repress the enemies of the Union; and the effect was to alarm public opinion and endanger the success at the polls on which towards the close of the contest all else depended.

city, or district menaced with invasion, without precluding the right of the military commander to impress property for the public service, or enroll the citizens compulsorily for the common defence. His authority arises from the exigency, and varies with it. It may be unlimited to-day, and vanish to-morrow with the disappearance of the danger which called it into being. Every such act on his part must be judged severally by the necessity for it or by what he had reasonable and probable cause to believe was necessary. Martial law is not, therefore, law in the proper sense of the term, which implies a rule operating uniformly, applicable to all men who fall within its terms and through an entire territory. It is much more nearly an authority, command, or power derived from the function of the President as commander-in-chief, and to be exercised according to a sound discretion, which, though not clothed with legal forms, is yet subordinate to the law, and accountable to it for any needless invasion of personal liberty or private right. To refer such an authority to the legislature or require their sanction for its exercise, is therefore to limit it where it requires scope, and enlarge it where it requires limitation.

Military action should be prompt, meeting the danger and overcoming it on the instant; it cannot, therefore, afford to wait on the deliberations of a legislative assembly. On the other hand, an act of Congress authorizing the exercise of martial law in a State or district gives the military commander a larger charter than the end in view requires or is consistent with freedom. Armed with the sanction of positive law, he need no longer consider whether his acts are justified by necessity. He may abuse the undefined power intrusted to his hands, and destroy life, liberty, and property without the shadow of an excuse, on an idle report or a rumor that will not bear the light.¹

The case of *Luther v. Borden*² has sometimes been regarded as sustaining the doctrine that martial law may be authorized by the legislature whether it is or is not justi-

¹ See *Mitchell v. Clark*, 110 U. S. 633; *post*, pp. 972, 978.

² 7 Howard, 1.

fied by the necessity of the case. The plaintiff, who was a citizen of Massachusetts, brought an action of trespass *quare clausum fregit* against the defendants who were citizens of Rhode Island, for breaking and entering his house in the latter State. The defendants pleaded that at the time when, etc., there was an armed insurrection to overthrow the government of the State of Rhode Island; that in self-defence martial law was declared by the legislature of the State; that the defendants were enrolled in the State militia, and under orders of their commanding officer attempted to arrest the plaintiff, who was aiding and abetting the insurrection, and in so doing unavoidably committed the acts complained of. The case was brought before the Supreme Court on a writ of error. One of the points decided by that tribunal was that the question whether the government which the insurgents sought to overthrow was the legitimate government, was a political question which did not form a fit subject for judicial consideration.¹ It had been decided by the President, to whom such subjects belonged under the Constitution, and his decision could not be reviewed by the court. The remaining point was whether the existence of the insurrection and the orders of the commanding officer were a justification for the acts committed by the defendants. Clearly a State could not establish a military government permanently. Such a government would not be republican, and should be overthrown by Congress. But a State might as clearly use the military power to put down an armed insurrection too strong to be controlled by the civil authorities. This power was essential to every government, and must be possessed by the States. Martial law might be declared under these circumstances, and the officers engaged in the military service of the State might, under the authority which it gave, arrest every one whom they had reasonable grounds to believe was a party to the insurrection. Without the right to do this, martial law and the military array of the State would be a mere parade. No more force, however, could be used than was necessary to accomplish the object;

¹ See *ante*, p. 124.

and if the power was exercised for the purpose of oppression, or an injury wilfully inflicted on person or property, the person who did or commanded the wrong would undoubtedly be answerable.

It is obvious that neither the circumstances of this case nor the decision of the court justify the idea that a State can establish martial law in the sense contended for by the minority of the court in *Ex parte* Milligan.¹ An armed body of insurgents had taken the field for the purpose of overthrowing the State government. The State might therefore lawfully use military force to subdue the insurgents. In other words, it might wage war; and the power to wage war implies a power to declare it. The declaration of martial law was virtually a declaration of war against the persons who were levying war on the State, authorizing the use of every lawful means of war, even to the destruction of life, and therefore necessarily conferring an authority to capture or inflict any lesser injury in the due prosecution of hostilities.

The gist of the plea in this aspect was the averment that the plaintiff was aiding and abetting the insurrection. If so, he was a public enemy of the State, who might lawfully be taken and imprisoned by virtue of the right of war. But it does not follow that the legislature did or could sanction the exercise of military power over persons who were not enemies, which is the essence of martial law, or that they did or could authorize a citizen to be tried and condemned to death militarily, as was contended for in *Ex parte* Milligan. On the contrary, Chief-Justice Taney explicitly declared that the measure of the necessity was the limit of the right, that no more force should be used than was requisite, and that if an injury was needlessly inflicted, the wrong-doer would be responsible to the courts.

Despite the judgment in *Ex parte* Milligan, the Supreme Court of the United States recently countenanced the act of March 3, 1863, which virtually established martial law, by arming the President and the officers under his command

¹ 4 Wallace, 21, 29. See *ante*, p. 962.

with a dictatorial power to deprive any man whom they regarded as inimical, of liberty and property. Agreeably to the fourth section, "any order of the President, or under his authority, made at any time during the existence of the present Rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest, or imprisonment made, done, or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress; and such defence may be made by special plea, or under the general issue."

The seventh section provided "that no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present Rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any act of Congress, unless the same shall have been commenced within two years next after such arrest, imprisonment, trespass, or wrong may have been done or committed, or act may have been omitted to have been done."

This statute assumed that Congress may provide that an order from the President, or under his authority, shall be a justification for any search, seizure, arrest, or imprisonment done or committed by virtue of such order, or under color of any law of Congress, irrespective of the circumstances, and whether these did or did not require the exercise of arbitrary power. It operated as a declaration of martial law throughout the length and breadth of the United States, by authorizing any commanding officer, of whatever grade, to arrest and imprison the citizen or despoil his goods, irrespective of the circumstances, or the necessity which alone can justify an arbitrary deprivation of the natural rights guaranteed by the Constitution of the United States. It was therefore directly in the teeth of the principles laid down in *Ex parte Milligan*, and may hereafter serve as a foundation on which to erect a government by the sword.

In *Bean v. Beckwith*¹ the court restricted the injurious tendency of the statute by holding that it applied solely to acts done under an authority given specifically by the President, which must be set forth in pleading, and did not throw the reins on the neck of every brigadier or colonel in charge of a post or district. "Assuming for this case," said Field, J., "that these statutes are not liable to any constitutional objection, they do not change the rules of pleading when the defence is set up in a special plea, or dispense with the exhibition of the order or authority upon which a party relies. Nor do they cover all acts done by officers in the military service of the United States simply because they are acting under the general authority of the President as commander-in-chief of the armies of the United States. They only cover acts done under orders or proclamations issued by him or under his authority; and there is no difficulty in the defendants setting forth such orders or proclamations, whether general or special, if any were made which applied to their case."

When, however, a similar question arose in *Mitchell v. Clarke*,² an order from a general in command to pay the rent due by a tenant into the military chest was treated as a defence to an action by the landlord, although there was no allegation or pretence that the President had authorized or sanctioned a proceeding which, as set forth of record, was at once frivolous and oppressive.

The action was brought for the rent of two storehouses in the city of St. Louis, and the defendant relied on two grounds,—(1) that he had paid the sum in question on or about the 24th of November, 1862, into the military chest of General Schofield, then in command in the State of Missouri, under an order from him, and could not, consistently with the act of March 3, 1863, above cited, be held liable to the landlord; and (2) that as the cause of action arose more than two years before the commencement of the suit, it was barred by the seventh section of the same statute. The majority of the court held that "possibly in a few cases acts might have been performed in haste and in the presence of an overpower-

¹ 18 Wallace, 510.

² 110 U. S. 633.

ing emergency for which there was no constitutional power anywhere to make good." There was, however, no doubt that Congress might provide that suits brought for any acts performed or omitted by or under orders from officers of the government, even when there was only a color of authority, should be removed into the courts of the United States for trial. It was not less clear that where such a removal could take place, Congress could prescribe the period of limitation for the courts of the United States. Otherwise there would be two inconsistent rules in different courts holding pleas of the same cause. An act done under color of an authority claimed to be derived from the government was a case under the Constitution and laws of the United States, whether or not such authority did in fact or could in law exist. Congress might, therefore, vest an exclusive jurisdiction in the courts of the United States, or regulate all the incidents of suits brought in the State courts. The plea rendered it plain that the purpose of General Schofield's order was to seize the debt due from the defendant and confiscate it for military purposes. The sum enforced from the tenant was the precise amount due to the landlord. It was to answer the landlord's obligation or default that the order was made on the tenant, and he had no choice but to obey. It might as well be said that the garnishee in an attachment was not protected in paying under an order of the court because there was error in the proceeding against his creditor. The case of *Harrison v. Myers*,¹ established that the seizure of the rent due under a lease from an absconding malecontent was an eviction which precluded the lessor from insisting on the contract. "His property was seized, and the tenant was no longer responsible to a landlord who could not secure him possession; and as the lessee was obliged to render obedience to a paramount authority, he might well enter into a new contract to protect his interest."

Contrasting this decision with the language held in *Mitchell v. Harmony*,² we seem to be in another land and under a different system of jurisprudence, and no one who was not

¹ 92 U. S. 111.

² 13 Howard, 115; see *ante*, p. 917.

assured of the fact would believe that both judgments were delivered by the same tribunal.¹ The money was not necessary for national or local defence, both landlord and tenant were loyal citizens, and viewing the case as it appears of record, General Schofield's order seems to have been as frivolous as it was unjust.

Field, J., dissented on the ground that no law ever enacted in the United States would justify a military officer in enforcing the payment to him of a debt due from one loyal citizen to another loyal citizen, neither being in the military service nor residing in a State declared to be in insurrection, or in which the courts were not open in the peaceful exercise of their jurisdiction. The statute could not give protection to any one in the commission of unlawful acts. General Schofield's order, and the payment made under it, were simply null, and did not operate as a defence. The provisions of the seventh section of the act of 1863, and the amendatory act of 1866, applied only to suits for acts or omissions on the part of persons acting under the orders of the President or the Secretary of War, or a military commander, and did not include actions for breach of contract between private parties. Could they be construed to embrace cases like the present, they would clearly be unconstitutional. The right of a lessor to sue the lessee for the rent was in no way dependent upon an act of Congress. Had the suit been against General Schofield for acts done, or money received by him as an officer of the General Government, it would have been a case under the Constitution and laws of the United States, and within the limitation prescribed by Congress. The true doctrine was, that the limitation of actions in the State courts for the enforcement of rights which are not dependent upon acts of Congress or the Constitution, is a matter purely of State

¹ We may infer that the tenant would not have been shot or imprisoned had he declined to obey General Schofield's order, and that he would simply have been ejected from his shop or dwelling and compelled to look for a shelter elsewhere. If so, there was hardly such duress as would shake the mind of a constant man or justify a breach of contract. See *Gates v. Goodloes*, 101 U. S. 612.

regulation, which the federal courts must follow when such actions are transferred to them.

There can be little doubt that so much of the defence as rested on the order given by General Schofield was invalid. The plea did not aver that the landlord was disloyal, or had participated in any way in the rebellion, or show any ground for the preposterous allegation that the seizure of the few hundred dollars due by the defendant was a necessary means for carrying on the war, and the defence and protection of the loyal citizens of Missouri; and the private property even of rebels cannot be confiscated without military necessity or due process of law. That the tenant was powerless to resist might be a reason for indemnifying him, but was not a reason for dismissing the suit brought by the landlord. The analogy of a payment by a garnishee under a foreign attachment, as relied on in the opinion of the court, would seem to afford an argument against the conclusion which they drew. An erroneous judgment may be a justification for such a payment; but decrees made and orders issued without jurisdiction are simply void, and no judgment can be conclusive on persons who are not parties or privy to the suit, unless the proceeding is *in rem*, which cannot be said of a foreign attachment.¹ A decree that the money or effects in the hands of a garnishee belong to the defendant in the attachment, and must be paid or delivered to the attaching creditor, is not therefore a defence to a suit by a third person who is the legal owner, although the garnishee may be as powerless as was the tenant in the hands of General Schofield.

The question, therefore, seemingly is, Does the inability of a debtor to resist an illegal order to pay the amount to a third person constitute a defence against the creditor? which should be answered negatively on principle and under the

¹ Taylor v. Carryl, 20 Howard, 583, 603; The Moses Taylor, 4 Wallace, 411; The Hine v. Trevor, Id. 555, 571; Keiffer v. Ehrliher, 18 Pa. 388; Megee v. Beirne, 39 Id. 50; Flanagan v. Mechanics' Bank, 54 Id. 398; Storm v. Elliott, 11 Ohio St. 252; Donahue v. Prentiss, 22 Wis. 311; Woodruff v. Taylor, 20 Vt. 65; Putnam v. McDougal, 4 Id. 478; 1 Smith's Lead. Cas. (8 Am. ed.) 1117, 1126; 2 Id. 966-973.

authority of *Williams v. Bruffy*.¹ The order there came from persons in arms against, and not for, the United States ; but this does not affect the legal aspect of a case which depends on whether duress can render the breach of a contract equivalent to performance. There is a manifest difference between the payment of a debt to a third person under the pressure of a *vis major*, and the surrender of a chattel which is held in trust or for safe keeping. Both cases are governed by the maxim *res perit domino*, which throws the loss on the bailor in the latter, and on the debtor in the former, because the money is his, although he owes it to the creditor. It is only when the obligation is to render the thing, and not things of a like kind, that a *vis major* or other inevitable accident can be relied on as a defence ; and an allegation that the debtor was stopped by a highwayman while bringing the money to the creditor has never been held a good answer to an action for debt.²

In *Mitchell v. Clarke* the court sagaciously avoided expressing an opinion as to the validity of General Schofield's order, by saying that possibly "in a few cases acts had been per-

¹ 96 U. S. 187. "Parties residing in the insurrectionary territory, having property in their possession as trustees or bailees of loyal citizens, may in some instances have had such property taken from them by force; and in that event they may perhaps be released from liability. Their release will depend upon the same principles which control in ordinary cases of violence by an unlawful combination too powerful to be successfully resisted. But, debts not being tangible things subject to physical seizure and removal, the debtors cannot claim release from liability to their creditors by reason of the coerced payment of equivalent sums to an unlawful combination. The debts can only be satisfied when paid to the creditors to whom they are due, or to others by direction of lawful authority. Any sum which the unlawful combination may have compelled the debtors to pay to its agents on account of debts to loyal citizens cannot have any effect upon their obligations; they remain subsisting and unimpaired."

² See *Luter v. Hunter*, 30 Texas. 688, 711, where the court relied on the opinion of Chief-Justice Chase in *Shortridge v. Macon*, Chase's Opinions, 136, 142, that payment under a compulsory decree of a *de facto* government does not discharge the obligation to the creditor, although the debtor has no choice but to obey.

formed in haste and in the presence of an overpowering emergency which there was no constitutional power anywhere to make good ;” and resting their judgment on the plea of the Statute of Limitations. There is no such reticence in the subjoined citation from the dissenting opinion of Mr. Justice Field :—

“Neither the President nor Congress can confer immunity for acts committed in violation of the rights of citizens. An army in the enemy’s country may do all things allowed by the rules of civilized warfare, and its officers and soldiers will be responsible only to their own government. But in loyal States, or in such parts as are not in insurrection, or declared to be so, and in which the courts are open, the rights of citizens are just as much under constitutional security and protection in time of war as in time of peace. Because civil war was raging in one part of the country the constitutional guaranties of the rights of person and property were not suspended where no such war existed. We sometimes hear the opposite doctrine advanced ; but it has no warrant in the principles of the common law or in the language of the Constitution. As I observed on a former occasion, our system of civil polity is not such a rickety and ill-jointed structure that when one part is disturbed, the whole is thrown into confusion and jostled to its foundation. The existence of insurrection and war in other States than Missouri, or in parts of that State distant from St. Louis, did not suspend the Constitution or any of its guaranties in that city. No proclamation of the President had ever declared Missouri to be in a state of insurrection ; and it is a matter within our judicial knowledge that St. Louis, so far from being the theatre of actual warfare, was a city where supplies were collected for military operations in other quarters, and where the courts were in undisturbed exercise of their jurisdiction.”¹

¹ The act of 1863 has been declared to be unconstitutional by the State courts, — *Griffin v. Wilcox*, 21 Ind. 370 ; *Johnson v. Jones*, 44 Ill. 142 ; *Clark v. Mitchell*, 23 Mo. 564, — as being in conflict with the Fifth Amendment ; and if valid as to future acts, could not, as it would seem, operate as a defence for wrongs done before its passage. *Johnson v. Jones*, 44 Ill. 142. See *Buron v. Denman*, 2 Ex. 167 ; *Bird v. Brown*, 4 Ia. 785 ; *Hare on Contracts*, 278, 290.

The irreparable injury that may be inflicted where power is wielded arbitrarily by persons who cannot be made answerable for their conduct,

It seems proper to inquire how far the military authority of the United States extends, agreeably to the opinion of the majority of the Supreme Court in *Mitchell v. Clarke*,¹ of the minority in *Ex parte Milligan*,² and under the statutes passed during the Rebellion and subsequent to its termination. This is the more needful because no small part of it is a new outgrowth, unknown to American law prior to the eventful year 1861.

1. Congress may, on the occurrence of insurrection or invasion, not only suspend the habeas corpus, but establish

although there is no intention to be unjust, is shown by the case of *Crosby v. Cadwalader*, brought to the October sessions, 1867, of the Circuit Court of the United States for the Eastern District of Pennsylvania. In December, 1863, at the height of the Rebellion, a drunken woman told a fellow-passenger in a railway train that a ship was about to leave the capes of the Delaware laden with powder, cannon, and other munitions of war, and would be seized while at sea by rebels disguised as passengers, as had happened a few days previously to a vessel which sailed from New York. The story was related to General Cadwalader, then in command at Philadelphia, who thought it his duty to report it to the War Department, and received a telegram in reply directing him to seize the vessel "*if the facts were true.*" They were entirely false, because the cannon, etc., were shipped by the authorities in charge of the Philadelphia Navy Yard for transfer to another naval station; but the ship was, notwithstanding, seized by a lieutenant and a file of soldiers, all the persons on board were confined for fifteen days in the casemates of Fort Mifflin, a large part of the cargo was abstracted by unknown persons and not returned, and it was not until some months had elapsed that the vessel was able to resume her voyage. The owners at the conclusion of the war applied to the government for compensation, but were told that the seizure was illegal, and redress must be sought in a proceeding against the general by whom the act was performed. The suit was brought; but when it came to trial the telegram which had been sent by the Secretary of War was produced, and the jury were instructed that if General Cadwalader was authorized by the department to arrest the plaintiffs and seize their vessel, the verdict must be for him. They so found, and the wrong done to the plaintiffs remained unredressed. It was probably owing to some such idle tale, which would not bear repetition after the heat of the conflict had passed, that General Schofield made the order which gave rise to the case of *Clarke v. Mitchell*. See Haldeman, *The Mysterious Barque*, Boston, 1886; *Lamb's Magazine of American History*.

¹ 110 U. S. 633.

² 4 Wallace, 2.

martial law throughout the length and breadth of the United States, and render every person in that vast territory liable to be sentenced to death by a military commission constituted for that end, as in the case of the Duc d'Enghien, or shaped adversely by the removal of a scrupulous member of the court and substituting some one who can be trusted to condemn.¹

2. "Military commissions are simply instrumentalities for the more effectual execution of the war powers vested in Congress, and the power vested in the President as commander-in-chief in war." That they are efficient instruments for good or evil, no one can doubt, because "pending the Civil War, and down to the termination of the Reconstruction Acts, they must have tried and given judgment in upwards of two thousand cases."² As distinguished from courts-martial, military commissions are constituted for the trial and conviction of civilians who are not subject to the military law proper. Congress have not, except in certain instances, specifically defined the extent and powers of these tribunals, and have, on the contrary, "left it to the President and the military commanders representing him to employ the commis-

¹ "By Special Order No 211, dated May 6, 1865, the Military Commission for the trial of Mrs. Surratt and others was constituted as follows: Major-Generals David Hunter, Lew Wallace, A. V. Kautz; Brigadier-Generals A. P. Howe, R. S. Foster, C. B. Comstock, T. M. Harris; Colonel Horace Porter, and Lieutenant-Colonel D. R. Clendenin.

"On May 9, 1865, the Commission met, all of the members and the accused being present. To afford the latter an opportunity of securing counsel, an adjournment was had until May 10, 1865.

"By Special Order No. 216, dated May 9, 1865, Brigadier-General C. B. Comstock and Colonel Horace Porter were relieved from duty as members of the Military Commission, and Brigadier-General James A. Ekin and Colonel C. H. Tomkins detailed in their places."

The change was made, without explanation, after the court had assembled, although before the members were sworn and the prisoners arraigned, and was currently said at the time to be prompted by a doubt whether the court as originally constituted would convict. This allegation was presumably unfounded; but the fact remains to show how widely a trial by court-martial differs from a trial at common law.

² 2 Winthrop's Military Law, 63.

sion as occasion may require for the investigation and punishment of the violations of the laws of war and other offences not cognizable by courts-martial."¹ As the court-martial is an abnormal outgrowth of the common law, so the military commission is an excrescence on the court-martial, and may deal as wantonly with private rights as did the Star Chamber or the arbitrarily constituted commissions in use under Elizabeth and Charles I.

Such commissions may be assembled by "commanders of departments, armies, divisions, and separate brigades. . . . The provisions of the Articles of War, indicating by whom the court is to be constituted when the commander who would regularly order it is in fact the prosecutor or accuser . . . are not required to be observed in the convening of these summary tribunals. . . ." Legally they may be composed "as the commander wills . . . as, for example, in part of civilians or enlisted men;" for, as Mr. Disraeli observed in Parliament, "in the state of martial law there can be no irregularity in the composition of the court, as the best court that can be got must be assembled."²

It is not, therefore, a vital objection to the proceedings of these tribunals, or indeed of a court-martial, that the same person is at once prosecutor, witness, and judge, and brings the charge, sustains it by his testimony, and convicts and sentences the accused.³ Nor is the jurisdiction confined to places which are the scene of hostilities, since in November, 1864, T. R. Hogg and six others were arrested for taking passage at Panama on an American merchant ship with the purpose of seizing the vessel and cargo while at sea on behalf of the Southern Confederacy, transported to San Francisco, and there tried and sentenced to death by a military commission.⁴ In the absence of any law fixing the number of the members of a military commission, "the same may be

¹ 2 Winthrop's Military Law, 57, 58, citing "XI. Opinions of Attorney-General, 305."

² 2 Winthrop's Military Law, 63, 64.

³ *Keys v. The United States*, 109 U. S. 336.

⁴ 2 Winthrop's Military Law, 67.

legally composed of any number, in the discretion of the convening authority," and a "commission of a single member" is as strictly legal as if there were thirteen.¹ I need hardly add that the members are not men who have been set apart for the administration of justice, but such persons as the commanding officer, who may be the accuser, thinks fit to select, and that for "the best court that can be got," unless human nature changes, we may, as regards the impartial administration of justice, occasionally read "worst."

3. Should the charter thus given not be large enough, or military commissions not prove sufficiently summary or expeditious, Congress may provide that "any order of the President or under his authority . . . shall be a defence in all courts to any action or prosecution, civil or criminal" for "any search, seizure, arrest, or imprisonment made, done, or committed by virtue of such order, or under color of any law of Congress. Armed with this authority, every commander of a department, army division or brigade, has absolute control over persons and property, may arrest, imprison, or exile without explanation or cause shown, turn a householder out of doors," or cancel debts by directing a payment of the amount due into the military chest, which will, agreeably to the view taken by the majority in *Mitchell v. Clark*,² be a defence to a suit brought by the creditor.³ The power is not restricted to districts which are occupied by a hostile army or are the theatre of war-like operations, and may be exercised over persons who are not shown or alleged to have been in arms against the United States, or to have given aid and comfort to their enemies; and it may, moreover, be relied on as a defence without proof that the act complained of was necessary as a means of upholding the authority of the government.⁴ Such, at least, is the tenor of the statute and the construction put upon it by the defendant in *Mitchell v. Clark*, and the Supreme Court carefully refrained from pronouncing it unconstitutional.

¹ 2 Winthrop's Military Law, 65. ² 110 U. S. 633. See *ante*. p. 972.

³ *Harrison v. Myers*, 92 U. S. 111; *Mitchell v. Clark*, 110 Id. 633, 645.

⁴ See *ante*, p. 972; *Mitchell v. Clark*, 110 U. S. 633, 635.

4. The above powers can be exercised only during invasion or insurrection; but these limits are elastic, and "as the President before a war is formally declared or initiated may be called upon to employ the army in defensive operations,"¹ "so military government may legally be continued in *bello nondum cessante* equally as *flagrante bello*."² Accordingly, a statute passed April 20th, 1871, six years after the termination of the civil war, provided that "whenever the unlawful combinations named in the preceding sections of this act shall be organized and armed, and so numerous and powerful as to be able by violence to either overthrow or set at defiance the constituted authorities of such State and of the United States within such State, or where the constituted authorities are in complicity with or connive at the unlawful purposes of such powerful and armed combinations, and whenever by reason of either or of all the causes aforesaid the conviction of said offenders and the preservation of the public safety shall become in such districts impracticable, in every such case such combination shall be deemed a rebellion against the United States, . . . and it shall be lawful for the President of the United States, when in his judgment the public safety shall require it, to suspend the writ of habeas corpus, to the end that such rebellion may be overthrown."³

Far-reaching as are these powers, more is needed to render them a thorough means of despotic rule. So long as the soldier can be made accountable in court and before a jury, he may think twice before executing an illegal command. To render the system complete, he must consequently be emancipated from civil control and made exclusively answerable to officers who can inflict punishment if he hesitates, and reward him if he obeys. This deficiency may, if the view taken in *Coleman v. Tennessee*⁴ is correct, be supplied by Congress.

It may be asked, What is the objection to military com-

¹ As, for instance, by ordering it into a disputed territory and rendering war inevitable. See *ante*, p. 172.

² 2 Winthrop's Military Law.

³ *Ante*, pp. 542, 939.

⁴ 97 U. S. 509, 514. See *ante*, p. 336.

missions and courts-martial? Why should not justice be as evenly administered by such tribunals as in the course of the common law? The answer is that justice will not be evenly administered by any body of men who are dependent on the power which institutes the prosecution and is interested in the result. So long as the judges were appointed and removable by the king, there was no security for life, liberty, or property in England where the Crown was concerned. Such protection as was given came from the jurors; and yet the judges had a standing commission, and were not, like a court-martial, selected with a view to particular cases. Soldiers may not be less just and trustworthy than civilians; but they are in the hand of the commanding general and the Secretary of War, and have, moreover, an *esprit de corps* which prompts them to sustain their comrades when charged with having unduly exercised military power, and to deal summarily with persons who are supposed to sympathize with rebellion or to be adverse to the prosecution of the war.

To guard against such evils and give independence and stability to the administration of the law, the Constitution provides that "the judges both of the Supreme and inferior courts shall hold their offices during good behavior;" and the military commissions which Mr. Winthrop views with so much complacency are contrary to the letter and spirit of this rule.¹ It was held on like grounds in *Antrim's Case* that Congress cannot constitutionally render the decision of a court-martial or military commission composed of persons appointed for the occasion and removable at pleasure, conclusive of the preliminary question whether the defendant has enlisted or is subject to the draft, or preclude the civil tribunals from discharging him if he is not a soldier and amenable to military law.² But for this remaining check the government of the United States might, on the occurrence of hostilities, be converted into a military despotism.³

¹ *Antrim's Case*, 5 Phila. 278, 288.

² *Ante*, p. 927.

³ The relation of the military and civil powers, and whether a soldier should unquestioningly obey the command of his officer, is viewed in France in a very different light from that of the common law. The con-

trast is illustrated by an incident related in the "Memoirs of the Duc de Broglie." A member of the French Chamber of Deputies, and leader of the extreme Left or Radical party, was arbitrarily expelled in 1823, by a legitimist majority, without sufficient cause. He declined to withdraw, and a sergeant and file of the National Guard were brought into the Chamber and directed to remove him by force. The sergeant refused to give the order, his men would not receive it from any one else, and it was not until a squad of gendarmes made their appearance that the majority obtained a victory which resembled a defeat. A question arose which seems to have been new in France, Was the sergeant's refusal justifiable? Can a soldier rightfully disobey orders? De Broglie relates the fluctuation of his mind on this point, but he finally arrived at the conclusion that a soldier is also a citizen, and should disregard any command which is contrary to law and the duty which he owes his country. The duke ends with a passionate wish that the battalion of Chasseurs de Vincennes which arrested him and other liberal members of the Chamber in 1851, at the command of the president of the French republic, and carried them like criminals through the streets to the barrack, had contained men like the sergeant. Louis Napoleon's order had certainly a color of authority, for it was stained with blood; and had it been brought before the French Court of Cassation would have been handled as gingerly as was the *color* of authority under which General Schofield acted in *Mitchell v. Clarke*. The duke also states that he was a member of a committee under the Martignac Ministry in 1830, for the reform of the military tribunals, and "proposed that their jurisdiction should for the future be restricted to crimes and offences against the rules of the service," and that officers and soldiers who used weapons without cause against their fellow-citizens "should be handed over to the ordinary tribunals as accomplices in an ordinary murder." The proposal did not take effect, and no such reform has, I believe, been made in France or any State on the continent of Europe.

LECTURE XLV.

The Jurisdiction of the Federal Courts depends on the Nature of the Cause or the Character of the Parties. — The object in the former case is to enforce the Constitution, Laws, or Treaties of the United States ; in the latter, to provide an Impartial Tribunal. — A State decision against a Right or Privilege claimed under the Constitution, or the Laws or Treaties made in pursuance thereof, may be taken by an Appeal or Writ of Error to the Supreme Court of the United States. — Where both Parties so claim, a decision in favor of either is against the Right or Privilege asserted by the other. — The Circuit Courts of the United States, if Congress so provide, may take cognizance of cases potentially involving a Federal Question, although it is not raised or put at issue. — Suits by or against Corporations chartered by the United States are within the Rule, although the validity of the Charter is not denied. — A baseless claim of a Right or Privilege under the Constitution or Laws of the United States will not give the Federal Courts jurisdiction originally or by removal.

AGREEABLY to the Third Article of the Constitution, sect. 2, of the United States, “the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority ; to all cases affecting ambassadors, other public ministers, and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects.” The power conferred by the above section may be ranged under two heads, — that where jurisdiction is conferred in view of the character of the parties, and that where it depends on the nature of the defence or cause of action. The power extends under the former head to “all cases affecting ambassadors, other public ministers and consuls,” to controversies to which the United

States shall be a party, to controversies between two or more States, between a State and citizens of another State, between citizens of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects.

The second head includes all cases in law and equity arising under the Constitution, the laws of the United States, or treaties made, or which shall be made, under their authority, cases of admiralty and maritime jurisdiction, and controversies between citizens of the same State claiming under grants of land from different States.¹

¹ The following extract from the judgment of Chief-Justice Jay, in *Chisholm v. Georgia*, 2 Dallas, 419, gives a succinct and excellent summary of the heads of federal jurisdiction, and the objects which they are intended to promote: "Let us now turn to the Constitution. The people therein declare that their design in establishing it comprehended six objects: first, to form a more perfect union; second, to establish justice; third, to insure domestic tranquillity; fourth, to provide for the common defence; fifth, to promote the general welfare; sixth, to secure the blessings of liberty to themselves and their posterity. It would be pleasing and useful to consider and trace the relations which each of these objects bears to the others, and to show that they collectively comprise everything requisite, with the blessing of Divine Providence, to render a people prosperous and happy. On the present occasion such disquisitions would be unseasonable, because foreign to the subject immediately under consideration. It may be asked, What is the precise sense and latitude in which the words 'to establish justice,' as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the second section of the Third Article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, namely: 1st, to all cases arising under this Constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them; 2d, to all cases arising under the laws of the United States; because, as such laws constitutionally made are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties; 3d, to all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or courts of a part of the nation; 4th, to all cases affecting ambassadors or other public ministers and consuls; because, as these are officers of foreign

This distribution of the subject was, like all the provisions of the Constitution, the result of principles deliberately applied for a definite and well-considered end.¹ The framers

nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority; 5th, to all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction; 6th, to controversies to which the United States shall be a party; because in cases in which the whole people are interested, it would not be equal or wise to let any one State decide and measure out the justice due to others; 7th, to controversies between two or more States; because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory; and because in a free country justice ought not to depend on the *will* of either of the litigants; 8th, to controversies between a State and citizens of another State; because, in case a State (that is, all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national court than in a court of the State to which those citizens belong, — the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated; because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter; and true Republican government requires that free and equal citizens should have free, fair, and equal justice; 9th, to controversies between citizens of the same State claiming lands under grants of different States; because, as the rights of the two States to grant the land are drawn into question, neither of the two States ought to decide the controversy; 10th, to controversies between a State or the citizens thereof and foreign States, citizens, or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by, and depend on, national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty, and the equal right of the people."

The Eleventh Amendment soon afterwards provided that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or citizens, or subjects, of any foreign State.

¹ *Osborne v. The Bank of the United States*, 9 Wheaton, 738, 819.

of the article had two main objects, — one, that every case involving a federal question, should, if the circumstances required it, be brought before a federal court; the other, that in suits between citizens of different States, or where a State, the United States, or foreign states, their ministers, consuls, subjects, or citizens were parties, there should be an impartial tribunal, on which both sides could rely with confidence. But for the latter rule there might be an entire failure of justice, through local prejudice or prepossession; but for the former, the administration of the laws of the Union would depend on the good faith, learning, and ability of the judges appointed by the various States; and if they were disaffected or incapable, there would be no means of redress. The judicial power should obviously be co-extensive with the legislative. If it be not, the government may be obliged to depend on courts deriving their authority from another source, and its laws may fail of effect, not from any inherent weakness, but because they are not faithfully applied.¹ As well might the execution of the laws of the United States be left to the governors of the several States as the final interpretation of those laws to the State judiciary. This axiom was enunciated in the “Federalist,” No. 80, and was relied on in giving judgment in *Cohens v. Virginia*.

Legislation was nevertheless requisite to carry these provisions into effect; and there was consequently room for a sound discretion in determining to what extent, and by what tribunals, the judicial power of the United States should be exercised. The outline was prescribed by the Constitution; but except in some principal features, such as the existence and jurisdiction of the Supreme Court, it was for Congress to fill it up.² As they might create inferior courts if they thought proper, so the powers of these tribunals would depend on the terms of the act. The words “shall extend” in the Third Article are imperative, but have practically been interpreted as equivalent to “may.” A literal construction

¹ *Cohens v. Virginia*, 6 Wheaton, 264, 414.

² See *Tennessee v. Davis*, 100 U. S. 257, 270, 275; *Mayor v. Cooper*, 6 Wallace, 217.

would have made it necessary to give the courts of the United States appellate, if not original, jurisdiction wherever the laws or the treaties of the United States were in question; but it was sagaciously resolved to vest so much only of the powers conferred by the third article as was requisite to carry out the main intent of the Constitution, and leave the residue in abeyance until circumstances required its exercise.

If the framers of the Constitution were wise in making the jurisdiction of the United States co-extensive with the field of legislation, the first Congress was not less discreet in limiting the exercise of the power. Cases arising under the Constitution and laws of the United States might well be left in the first instance to the State tribunals, so long as there was an appeal to the national court of the last resort if the decision was unfavorable to the right claimed under the federal bond. There was little danger that the local tribunals would incline against the government of which they were a branch, and if they erred in this regard, the mistake would be rectified as the limits of the national authority came to be accurately defined. So the right to proceed in the federal courts, in cases where jurisdiction depended on the character of the parties, was confined, unless foreign nations, their representatives or subjects were concerned, to suits brought by or against a citizen of one State in the courts of another, where he might have reason to apprehend partiality or injustice. The Supreme Court would thus be left free to perform its great function as arbiter of the Constitution, without being embarrassed with questions growing out of the local laws of a multitude of sovereignties, which the federal judiciary could not understand or apply as accurately as judges who had made them a life-long study.

The original jurisdiction of the circuit courts of the United States was confined, conformably to this view, by the Judiciary Act of 1789, to cases where from the character of the parties, or the relation which they bore to each other or the States, there was reason to apprehend that the scales would not be evenly held in the State tribunals; and questions aris-

ing under the federal Constitution and laws were left to the local courts, with a right of appeal to the Supreme Court of the United States, if the State court of last resort inclined against the right or privilege or exemption claimed under the authority of the Union. Agreeably to the twenty-fifth section of the Judiciary Act of 1789, the final judgment or decree of the highest court of law or equity of a State might be reversed or affirmed in the Supreme Court of the United States upon a writ of error under the following circumstances: First, where the validity of a treaty, or statute of, or authority exercised under, the United States was "drawn in question," and the decision was "against their validity;" Second, where "the validity of a statute of or authority exercised under a State" was controverted as "repugnant to the Constitution, treaties, or laws of the United States," and "the decision was in favor of their validity;" Third, where the construction of any clause of the Constitution, or of any statute or treaty, or commission held under the United States was drawn in question, and the decision was "against the right, title, privilege, or exemption specially claimed by either party under such clause, statute, or commission." To give jurisdiction under this statute it must consequently appear, not only that some right, privilege, or exemption claimed under the Constitution, laws, or treaties of the United States is involved, but that the decision was adverse to the claim. Hence a writ of error will not lie because the court below misinterpreted the Constitution, unless it sanctioned some deprivation which that forbids, or withheld some right which it confers. If, for instance, the judgment is that a stay-law impaired the obligation of a contract contrary to the Constitutional prohibition, when in fact it was not so impaired, the case is at an end and redress cannot be sought at Washington. The point was so adjudged in the *Railroad Co. v. Rock*,¹ and *Ryan v. Thomas*,² in accordance with the previous course of decision.³ When however both parties "claim a right, privilege, or immunity under the Con-

¹ 4 Wallace, 177.

² 4 Wallace, 603.

³ *Mills v. Brown*, 16 Peters, 525; *Lawter v. Walker*, 14 Howard, 149.

stitution, or any treaty or statute of or commission held, or authority exercised, under the United States," a decision in favor of the title so asserted by either is necessarily against that relied on by the other, and whichever way judgment is given it may be reversed by the national court of the last resort. Such a question may arise where the defendant relies for his justification on an authority from the President as commander-in-chief, and the plaintiff on a constitutional guaranty which the act complained of violated. The same remark applies when the case depends on two irreconcilable statutes, and one of them is alleged to be unconstitutional, or to have been repealed by the other.¹

In *Trebilcock v. Wilson*, a mortgagor asked for an order compelling the mortgagee to take the United States notes which were made a legal tender by the act of Feb. 25, 1862, in payment. The mortgage was payable in specie, and the mortgagee contended that the act was unconstitutional, and that he was at all events entitled under the case of *Bronson v. Rhodes*² to be paid in the gold and silver coin which were the only legal tender when the debt was contracted. The State court rendered a decree against him, and a writ of error was taken to the Supreme Court of the United States, which held, overruling *Roosveld v. Meyer*,³ that the case fell within the appellate jurisdiction given by the acts of 1879 and 1867. The right of the mortgagee to be paid in specie depended as entirely on the Constitution of the United States as did the validity of the statute under which the mortgagor claimed the right to pay in notes. Aside from this, the case involved the construction of two several acts of Congress, — one creating a metallic, the other a paper, currency. If the contract fell within the former, the plaintiff in error ought to have judgment; if it was governed by the latter, judgment should be rendered for the defendant. A decision in favor of either was therefore against a "right claimed under a statute of the United States."

The original jurisdiction of the Supreme Court is limited

¹ *Trebilcock v. Wilson*, 12 Wallace, 687.

² 7 Wallace, 229.

³ 1 Wallace, 512.

by the wording of the grant to cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party; but no such limitation is imposed on the inferior courts which Congress are authorized to ordain and establish, and they may consequently, if Congress so provide, take cognizance of every case arising under the Constitution and laws of the United States in the first instance, or through a writ of error or *certiorari* issued to remove the cause from the State tribunals. Whether their jurisdiction shall be original or appellate depends on the will of the legislature, which may also render the jurisdiction of the circuit courts exclusive, or leave the parties free to proceed in the State tribunals.

Although the judiciary act did not authorize the inferior courts which it created to take cognizance of cases under the Constitution and the laws of the United States, and left the administration of the federal as well as State laws to the local tribunals, the power none the less remained, and might be called forth whenever a larger measure of authority was necessary to the integrity and maintenance of the Union; and instances might obviously occur when it would be essential for the officers and agents of the General Government to proceed directly in the national tribunals, with a view to the effectual performance of their duties.¹ Such an occasion arose out of the incorporation of the United States Bank, which was viewed adversely in some of the States, and might be hindered in the performance of its functions if it were obliged to pass through the local tribunals, and then look for redress to the Supreme Court of the United States. The bank was accordingly empowered by its charter "to sue in all State courts having competent jurisdiction, and in any circuit court of the United States." It brought an action against the treasurer of the State of Ohio to recover money which he had taken from its vaults in payment of a tax unconstitutionally imposed by the State, and it was contended for the defence that broad as were the terms by which juris-

¹ See *Tennessee v. Davis*, 100 U. S. 257, 267; *Ex parte Yarborough*, 110 Id. 651, 659.

diction was conferred in all cases arising under the Constitution and laws of the United States, the succeeding clauses indicated that the power was to be exercised only through an appeal to the Supreme Court, and that the jurisdiction of the circuit courts was limited to cases where the character of the parties gave jurisdiction, which could not be maintained in the instance under consideration.

Chief Justice Marshall said, in overruling this contention, that the Supreme Court had appellate to the exclusion of original jurisdiction in cases arising under the Constitution and laws of the United States by the express words of the grant; but this did not preclude Congress from conferring original jurisdiction on the inferior courts. Such an interpretation would restrict the grant of judicial power, which was general, to cases brought on appeal from the State tribunals and prevent the United States from establishing courts of the first instance to administer their laws. The intention of the framers of the Constitution in limiting the Supreme Court to an appellate jurisdiction was to preserve the dignity of that tribunal, not to impose a restraint on the inferior courts, which might exercise either an appellate or original jurisdiction under the broad and comprehensive words by which judicial power was delegated.¹

While the Constitution was distinct in giving the federal tribunals cognizance of all cases arising at law or in equity under its provisions or the acts of Congress, what constitutes such a case was not defined, and remained open for consideration in the courts which were to administer the power. It is now settled, on the lines drawn by the great Chief-Justice to whom we owe the filling-up of the plan prepared by the founders of our government, that the case need not arise exclusively under the federal laws or Constitution; it is enough that they confer or enter into any right which is or might be controverted on either side.² As was said in *The*

¹ *Osborn v. The Bank of the United States*, 9 Wheaton, 738.

² *The Mayor v. Cooper*, 6 Wallace, 247; *Tennessee v. Davis*, 100 U. S. 257, 270; *Ames v. Kansas*, 111 Id. 449; *Starin v. New York*, 115 Id. 218, 257; *Provident Savings Life Ins. Co. v. Ford*, 114 Id. 635, 641.

Mayor v. Cooper, "It is not an objection that questions are involved which are not of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient."

The leading case is *Osborn v. The Bank of the United States*. The bank sued in the Circuit Court of the United States, under an authority conferred by its charter, for money alleged to have been illegally taken from its vaults under an invalid tax law of Ohio; and the question was, Could Congress confer such a right irrespectively of the nature of the cause of action; or, in other words, could the bank be empowered to proceed in the federal courts although the case involved no federal element save the bare fact that the plaintiff was a corporation chartered by the General Government? A decree was rendered against the defendants, who appealed to the Supreme Court of the United States.

It was contended on their behalf that Congress could not confer jurisdiction on the courts of the United States where the matter at issue arose under the laws of a State. It was manifest that this could not be done where the plaintiff was an individual, and it made no difference that the suit was brought by a corporation chartered under the authority of Congress. The cases where the character of the parties conferred jurisdiction were specifically enumerated in the Constitution, and did not include corporations deriving their existence from the United States. A controversy regarding a promissory note or a bill of exchange could not be said to arise under the laws of the United States, because the payee or holder was a bank incorporated by Congress. Such an institution could not sue in the federal courts for a breach of contract or a trespass, because neither the character of the party nor the nature of the controversy was within the judicial power given by the Constitution. If the defendant contested the validity of the charter, or called any other law of the United States in question, the case might be said to be under the Constitution and laws of the Union. But this was not pretended in the case under consideration; and if it were, the jurisdiction would under the language of the Con-

stitution, as construed in *Marbury v. Madison*,¹ not be original but appellate. On the other hand, Henry Clay, of counsel for the bank, contended that every case where the suit is by or against a bank or other body corporate created by Congress is, in the strictest sense of the term, a case arising under the laws of the Union. But for the law chartering the bank, the case would never have existed. If the law were repealed the case would be at an end. Such a corporation could not come into court without bringing the statute in their hands. If it was said that the character of the case depended upon the questions actually controverted, the answer was that no such restriction was imposed by the Constitution; and when such a controversy was brought into court no one could foretell what course it would take while there. The right of the plaintiff to sue and the jurisdiction of the court did not depend on the line of defence chosen by the party against whom the suit was brought.

This view was adopted by Chief-Justice Marshall. The appellants, he observed, contended that the case was not within the jurisdiction of the court, because it involved questions depending on the general principles of jurisprudence, and did not necessarily turn on the validity of the act chartering the Bank of the United States. If such was the rule, the jurisdiction of the federal courts would be singularly restricted. It seldom happened that every part of any case depended on the Constitution, the laws, or the treaties of the Union. In almost every instance there were questions over which, if they stood alone, the courts of the United States would not have jurisdiction. Could it be said that a demand based upon an act of Congress did not fall within the terms of the Constitution because the defence consisted in an allegation that the demand had been released or satisfied? If so, the right to hear and determine the cause depended on the course taken by the defendant, and he might oust the jurisdiction of the court by pleading in confession and avoidance. In the case under consideration the right of the plain-

¹ 7 Cranch.

tiffs to sue grew out of the statute which made them a body politic and corporate. If that was invalid they had no existence as a legal entity capable of maintaining an action. Had the suit been brought when the bank was first incorporated, it would clearly have fallen within the grant of judicial power to the United States. The validity of the charter was then denied, and might be considered doubtful. It had since been established by the decisions of the Supreme Court, but this did not vary the case or defeat the jurisdiction. The defendant might still conceivably deny the authority of Congress, and if he did so the controversy would confessedly arise under the Constitution. What course he would adopt could not be known until the cause was heard. To ascertain what is embraced in a cause, it is necessary to consider what will be concluded by the judgment; and a judgment is confessedly conclusive of every point which might have been raised in pleading, whether it is or is not actually put at issue and determined. The right of the bank to sue in the federal courts stood on the same footing as that of the officers of the government. The Postmaster-General, for example, could not maintain such a suit by virtue of the clauses of the Constitution which gave jurisdiction in view of the character of the party. The jurisdiction of the court arose in such cases from the circumstance that the authority of the Postmaster-General to contract on behalf of the United States was derived from a law of Congress. The defendant might concede the validity of the law, and rest the defence on payment, and yet no one contended that the adoption of such a course on his part would preclude the court from giving judgment of jurisdiction. The right to sue in the Circuit Court for the infringement of a patent rested on the same principle. Such a case depended on the Constitutional provisions securing an exclusive right to inventors and the statutes passed to carry them into effect. Yet the defendant might not question the validity of the patent, or make any point involving the construction of the patent laws, and might confine himself to an allegation that he had not used the plaintiff's invention. This plea would then be the sole

matter in controversy; but the cause would not on that account cease to be under the Constitution and laws of the United States.

This decision establishes, first, that if any part of a case arises under the Constitution or laws of the United States, the whole will be within the judicial power conferred by the Constitution; and next, that this power may, if Congress think fit, be vested exclusively in the national tribunals. In every instance, therefore, where the demand is based upon a law or grant of the United States, or where the defendant does or may rely upon such a law or grant as a justification, jurisdiction may be conferred on the federal courts to the exclusion of the State tribunals.¹ When, for example, the plaintiff brings trespass for an injury to land or chattels, or for the breach of an agreement to construct a house or carriage, the case is *prima facie* within the jurisdiction of the State courts, and beyond the judicial power conferred by the Constitution. If, however, a certificate of bankruptcy is pleaded in bar of the right to damages, or an authority or title derived from the United States relied on as a justification for the trespass, the case will cease to be exclusively under the law of the State, and depend on the construction of the Constitution and laws of the Union.² It may, therefore, if Congress so provide, be removed by a *certiorari*, or other writ of a like kind, from the tribunal where it was originally instituted, and submitted to a circuit or other subordinate court of the United States. And as the due administration of justice requires that a case shall not be examined by parcels, or one part considered to the exclusion of the rest, the authority of the State court will thereupon cease, and jurisdiction vest absolutely in the national tribunal.³ A suit on the official bond given by a United States marshal under an act of Con-

¹ Pacific Railroad Removal Causes, 115 U. S. 2, 15.

² *Givin v. Brendlove*, 2 Howard, 29; 6 Id. 7; *Feibelman v. Packard*, 109 U. S. 421.

³ See *The Mayor v. Cooper*, 6 Wallace, 270; *Tennessee v. Davis*, 100 U. S. 257, 268; *Strander v. West Virginia*, Id. 303; *Virginia v. Rives*, Id. 313.

gress is within this principle, although the breach set forth in the declaration is taking goods out of the plaintiff's possession under a proceeding in bankruptcy against a third person, contrary to the laws of the State where the act was done.¹

In the *Pacific R. R. Removal Cases*,² the exhaustive argument of Chief-Justice Marshall, in *Osborn v. The Bank of the United States*, — “delivered more than sixty years ago, and always acquiesced in,” — was said to show conclusively “that a suit by or against a corporation chartered by Congress is a suit under the laws of the United States.” It followed that railway companies deriving their corporate existence from that source may, if Congress so provide, proceed in the federal courts, or remove the suits brought against them to such courts from the State tribunals, although the cause of action is a book debt or other pecuniary demand, and the only issue payment; or though the controversy grows out of a proceeding instituted in the State tribunals under the local laws for the widening of a street. The existing national banks are potentially in the same category, although the right of removal is limited by the Act of July 12, 1882, to cases where a similar suit by or against a State bank can be so removed.³

Agreeably to these decisions, the judicial power of the United States extends beyond the other departments of the Government, and may be exercised over matters in which they have no direct concern, although the effect is to abridge the jurisdiction of the States in a corresponding ratio. An act of Congress which assumes to regulate commerce generally, without excepting the purely internal commerce of the States, is simply void.⁴ But if any part of a case relates to commerce among the States or with foreign nations, it is immaterial that the residue grows out of a contract

¹ *Feibelman v. Packard*, 109 U. S. 421. See *Sharp v. Doyle*, 102 Id. 686.

² 115 U. S. 1, 11. See *Searl v. School District*, 124 Id. 197.

³ *The Leather Man. Bank v. Cooper*, 120 U. S. 778, 781.

⁴ See *ante*, p. 439.

made and to be performed within a State, and the entire cause may be withdrawn from a State court and brought before a federal tribunal which will not be governed by the decisions of the State courts in determining whether the contract has been broken, or the validity of the right claimed under it.¹

The decisions, at the same time, are that, to bring a case within the principle, some right, title, privilege, or immunity conferred or arising under the Constitution or an act of Congress, must be actually involved, and that a baseless plea or allegation to that effect will not suffice.² In *Starin v. New York*,³ a suit in equity was instituted against the Independent Steamboat Company, and certain other companies and persons, who were joined as defendants, to prevent them from infringing an exclusive right of ferriage claimed by the city of New York between Manhattan Island and the north shore of Staten Island, across the strait known as Kill Van Kuhl. The answer averred, as a matter of special defence under the laws of the United States, that the Independent Steamboat Company was chartered under the laws of New Jersey for the purpose of transporting persons and property, as common carriers for hire, in and over the waters of the Bay of New York and the adjacent straits, which were waters of the United States; that the boats of the company were enrolled and licensed under the laws of the United States for carrying on the coasting-trade on such waters; and that the decree asked for would be a restraint on navigation and an obstruction to the interstate commerce, which was exclusively under the control of Congress. The record was removed on these grounds to the Circuit Court of the United States, but remanded to the State court, and the Supreme Court of the United States sustained the decision. The United States had not in any manner attempted to interfere with the power of a State to grant exclusive ferry privileges across public

¹ See *ante*, 442; *Homer v. Brown*, 16 Howard, 354; *Miller v. Brown*, 13 Id. 218; *Dred Scott Case*, 19 Id. 393, 603.

² *Provident Savings Life Ins. Co. v. Ford*, 114 U. S. 635, 638, 641; *Germania Ins. Co. v. Wisconsin*, 119 U. S. 473, 476.

³ 115 U. S. 248, 257.

waters between places within its own jurisdiction. On the other hand, no attempt was made by the complainants to control the use of the licensed and enrolled vessels of the defendants in any other way than by preventing them from running as a ferry in violation of the exclusive right asserted by the city. There was consequently no conflict between the franchise claimed on one side and the right accorded on the other by the Constitution and laws of the United States; and the question whether the franchise existed presented no point that could give the federal courts jurisdiction or justify the removal of the cause. The case of *Hartell v. Tilghman*,¹ goes still further in the same direction, and to an extent which, as the minority of the court held, clashes with *Osborn v. The Bank*.

So in *The Germania Ins. Co. v. Wisconsin*,² a summons issued in a proceeding by the State of Wisconsin in one of its own courts against an insurance company chartered by another State to recover certain statutory penalties, was returned by the sheriff as "served on L. D. Harmon, being then and there an agent of the defendants." A petition to set aside the service on the ground that Harmon was not the defendant's agent was followed by another for the removal of the cause to the Circuit Court of the United States on the ground that it was an attempt to exercise jurisdiction over a company which was not subject to the authority of the court, without the due process of law required by the Fourteenth Amendment. The Supreme Court of the United States held that there was no right to the removal. As the record stood, the right of recovery depended alone on whether the summons had been served on a person who was at the time an agent of the company within the State, on whom process might legally be served so as to bind the company and bring them within the jurisdiction of the court. This was a mixed question of law and fact, in no way dependent on the construction of the Constitution or any law of the United States. There was nothing in the complaint which disclosed any such case, and until the company submitted

¹ 99 U. S. 457.

² 119 U. S. 473.

themselves to the jurisdiction of the court they could not be permitted to allege any new matter. The suit therefore did not as yet really and substantially involve a dispute or controversy within the jurisdiction of the Circuit Court, and it was properly remanded.

It results from this decision that a citizen of one State may be compelled to choose between appearing in the courts of another by a summons served on an entire stranger, and suffering a judgment to be rendered by default which may be enforced against any property that he may have within the State, and be made the ground of a recovery in the place where he resides or is domiciled unless he can prove that the person on whom the writ was served was not his agent; and cannot raise the question whether the means taken for the end are due process of law in the sense of the Fourteenth Amendment, by removing the cause to a federal court, or except by a writ of error to the Supreme Court of the United States.

In the *Provident Savings Life Insurance Society v. Ford*,¹ the court held, following the same line of thought, that a suit brought on a judgment recovered in a federal court is not a case under the Constitution and laws of the United States, or susceptible of removal from a State to a national tribunal. A judgment was said to be a mere security, like a treasury note or bond. It could not be contended that an action of trover for withholding such securities was a case arising under the laws of the United States. So a suit for waste or a trespass on land is not such a case, although the plaintiff holds under a federal grant or patent. Such a suit is wholly unlike "a suit by or against a company chartered by the United States," which, according to the masterly analysis of Chief-Justice Marshall in *Osborn v. The Bank of the United States*, is pervaded from its origin to its close by United States law and United States authority.

This decision was no doubt sound relatively to the matters in hand. No argument is requisite to prove that cases should not be removed from the State courts hypothetically, nor

¹ 114 U. S. 635, 642.

unless they actually present a question under the Constitution or an act of Congress ; but it does not follow that cases potentially involving such questions may not, if Congress so provide, be brought in a circuit court, nor that the *Provident Savings Life Insurance Society v. Ford* was not such a case. The right of recovery on the judgment of a federal tribunal depends on whether the court had jurisdiction of the cause and the parties under the Constitution in view of the Judiciary Act, — things which may be denied with as much or as little reason as could the constitutionality of the act in *Osborn v. The Bank of the United States*, and therefore bring the case within the rule there laid down, whether they are or are not actually put at issue. The decisions may seemingly be reconciled on the ground that while Congress can give the federal courts jurisdiction when the Constitution, laws, or treaties of the United States are potentially without being actually involved, the act will not be so construed in the absence of an explicit declaration.

LECTURE XLVI.

Growth of Admiralty Jurisdiction in the United States. — Extends above the Ebb and Flow of the Tide, and may be exercised over all Navigable Waters affording a means of interstate or foreign Commerce. — Includes Marine Policies, Charter-parties, and other Contracts ancillary to Navigation. — How related to the Power over Commerce. — May attach to Vessels trading between Ports of the same State. — Covers Injuries done to and on board of Vessels, though resulting from the Obstruction of the Channel. — But not Injuries done by Vessels to Bridges or other fixed Structures. — May be exercised as to Controversies among Foreigners. — Admiralty Jurisdiction *in rem* exclusive of, that *in personam* concurrent with the State tribunals. — Jurisdiction under the Act limiting the Liability of Owners to the amount of their interest in the Vessel. — Seizure by Marshal of a Vessel levied on by Sheriff invalid. — Contracts for the Construction of a Vessel do not fall within the Jurisdiction of the Admiralty, and may be Prosecuted *in rem* in the State courts.

THE grant of judicial power also includes “all cases of admiralty and maritime jurisdiction,” — another application of the principle that the judicial power of a government should be co-extensive with the legislative. Congress, as we have seen, are authorized to regulate commerce, to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, to grant letters of marque and reprisal, and make rules concerning captures by land and water, — powers which might fail of effect if the federal courts could not take cognizance of the questions that grow out of their exercise. Such a jurisdiction is the more requisite, because it covers a multitude of cases, and among them collisions at sea, contracts of bottomry and respondentia, and supplies furnished on the credit of the vessel, which the common law does not reach, or to which it is inadequate.

The admiralty jurisdiction of the United States has been carried by the force of circumstances beyond the bounds to which it was jealously confined in the parent country by the

paramount authority of the courts of common law, and now includes ancillary contracts relating to navigation, as well as those which directly concern the vessel and are to be carried into effect on the high seas. The law was so held as to maritime insurance by Story, J., in *De Lovio v. Boit*,¹ and adopted by the Supreme Court in *The Insurance Co. v. Dunham*,² notwithstanding the objection that the effect was to impair the right to a jury trial as guaranteed in the amendments, by leaving both the law and the facts to the judges.³ Such is the rule where any part of the transit, under an entire contract, is on the ocean, its bays or sounds, though the rest of the journey is by land,⁴ and it is now applied to vessels traversing the lakes and rivers which afford a means of intercourse with other States and foreign countries.⁵

¹ 2 Gallison, 398.

² 11 Wallace, 1, sect. 28.

³ *Sheppard v. Steele*, 43 N. Y. 52, 61; *Edwards v. Elliott*, 36 N. J. Law, 449, 458.

⁴ See *Lord v. The Steamship Company*, 102 U. S. 541, *ante*; *The Lexington*, 6 Howard, 344; *The Moses Taylor*, 4 Wallace, 411; *The Insurance Co. v. Dunham*, 11 Id. 28.

⁵ See *The Jefferson*, 10 Wheaton, 428; *The Lottawanna*, 21 Wallace, 558, 609; *The Magnolia*, 20 Howard, 296; *The Belfast*, 7 Wallace, 624.

"In the case of *The Moses Taylor*, it was decided that a contract to carry passengers by sea, as well as a contract to carry goods, was a maritime contract, and cognizable in admiralty, although a small part of the transportation was by land, the principal portion being by water. In a late case of affreightment, that of *The Belfast*, it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of interstate commerce. But, as the transportation was on a navigable river, the court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford, delivering the opinion of the court, says: 'Contracts, claims, or service, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts, or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality.' It thus appears that in each case the decision of the court, and the reasoning on which it was founded, have been based upon the fundamental inquiry, whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the

It is established under these decisions that not only salvage, wharfage, work done and supplies furnished to the vessel at the home port or during the prosecution of the voyage, but policies of insurance and contracts for the transportation of goods and passengers,¹ and all contracts, claims, or services purely maritime and touching rights and duties appertaining to commerce or navigation, are cognizable in the admiralty courts,² which also take cognizance of torts or injuries of a civil nature committed on navigable waters. "Jurisdiction in the former case depends upon the nature of the contract, but in the latter entirely on the locality."³ Suits by ship-carpenters and material-men for repairs, materials, and supplies, and by pilots for pilotage, are consequently within the jurisdiction.⁴ Such also is now the rule in England by act of Parliament.⁵

Claims for supplies furnished and work done to a vessel at her home port may be prosecuted *in personam* in the admiralty, but do not, agreeably to the practice in England and the United States, give rise to a maritime lien.⁶ When, however, such a lien is created by a State legislation it will fall within the exclusive jurisdiction of the Admiralty, and may be enforced by a proceeding *in rem*.⁷ No such proceeding can, however, be maintained in the State tribunals, even when it is specifically authorized by the act which gave the lien ;

contract was made, but on the subject-matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the court." *Ins. Co. v. Dunham*, 11 Wallace, 28.

¹ *Ex parte Easton*, 95 U. S. 68; *The Josephine*, 39 N. Y. 19; *Brookman v. Hamill*, 43 Id. 554; *Morewood v. Enequist*, 23 Howard, 491; *The Eddy*, 5 Wallace, 481.

² *The Lexington*, 6 How. 344; *Ins. Co. v. Dunham*, 11 Wallace, 1, 36.

³ *The Belfast*, 7 Wallace, 624, 646.

⁴ *The New Jersey Steam Navigation Co. v. The Merchants' Bank*, 6 Howard, 344; *The Insurance Co. v. Dunham*, 11 Wallace, 1; *Ex parte Hagar*, 104 U. S. 520; *Ex parte Pennsylvania*, 109 Id. 174.

⁵ See *Northcote v. The Owners of The Henrich Björn*, L. R., 11 App. Cas. 270.

⁶ *The General Smith*, 4 Wheaton, 438; *The Lottawanna*, 21 Wallace, 558, 609; *The Josephine*, 39 N. Y. 19.

⁷ *The Lottawanna*, 21 Wallace, 558.

and the object was to enable them, and not to enlarge the admiralty jurisdiction of the United States.¹ Such a result would seem to be at variance with the rule that a statute which is unconstitutional in any material particular is entirely void unless the valid part is separable, and it can justly be inferred that the legislature would have adopted it had they known that the rest would fail.²

The extension of the powers of the admiralty beyond the ebb and flow of the tide is simply an application of the maxim, *Cessante ratione cessat ipsa lex*; because the English rule depended on the fact that navigation is there seldom if ever practicable above tide-water, while not a few of our rivers are navigated to ports many hundreds of miles from the sea, and the great lakes afford a still wider scope.³ There is the more reason for such a conclusion since interstate as well as foreign commerce is placed by the Constitution under the guardianship of Congress. If the trust were not administered as regards navigation through the admiralty courts of the United States it would devolve on the State courts, and a

¹ The *Josephine*, 39 N. Y. 19; *Sheppard v. Steele*, 43 Id. 52, 61; The *Lottawanna*, 21 Id. 558; The *Moses Taylor*, 4 Wallace, 411.

² See *ante*, p. 412; The *Josephine*, 39 N. Y. 19; *Sheppard v. Steele*, 43 Id. 52, 61; *Baldwin v. Franks*, 120 U. S. 678, 707.

The judgment in *De Lovio v. Boit* ran counter to the previous course of decision, and was generally regarded as an innovation. See *L'Arina v. Manwaring*, Bee, 199; *Talbot v. The Commanders*, 1 Dallas, 103; *Jackson v. Steamboat Magnolia*, 20 Howard, 296; *Taylor v. Carryl*, Id. 583; *Cutler v. Rae*, 7 Howard, 729. In *The Magnolia*, 20 Howard, 296, the ground taken in *De Lovio v. Boit* was described as "the broad pretension set up by Mr. J. Story under which the legal profession and this court staggered for thirty years without being able to maintain it." But there has been no such criticism of the cases which carry the admiralty jurisdiction of the United States beyond the ebb and flow of the tide, which was the limit set in England, and make it coextensive with the water-ways which afford the means of communication among the States and with foreign countries. The *Genesee Chief*, 12 Howard, 443; The *Magnolia*, 20 Id. 296; *The Insurance Co. v. Dunham*, 11 Wallace, 1, 36; The *Lottawanna*, 21 Id. 558, 609.

³ The *Genesee Chief*, 12 Howard, 443; *The Hine v. Trevor*, 4 Wallace, 555, 561; The *Magnolia*, 20 Howard, 296, 343.

voyage beginning on the great lakes or Mississippi and ending a thousand miles from its commencement might be subjected to conflicting liens administered by tribunals having no common head and proceeding under different laws.¹ The need of uniformity in the commercial transactions of an extensive and populous country was the chief argument for placing contracts of insurance under the control of the admiralty, and it applies with greater force to all that concerns navigation.

The power of the United States over navigation springs from the commercial power, which is limited to commerce among the States and with foreign nations; and it was contended that as the stream cannot rise higher than its source, contracts for the transportation of goods or passengers by river from one port in a State to another were no more subject to the admiralty jurisdiction of the federal courts than if the carriage took place by land.² Reasoning from these premises, it followed that vessels trading between ports of the same State on a river exclusively within her boundaries could not be regulated by Congress, or libelled in the admiralty for the breach of a contract of assignment or the damages occasioned by a collision.

Agreeably to the view taken in *Allen v. Newberry*,³ contracts for the transportation of goods from one port in a State to another on waters above the ebb and flow of the tide are not maritime or within the jurisdiction of the admiralty; and such also was held to be the rule with regard to supplies furnished for such a voyage.⁴

¹ See *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wallace, 558, 609; *The Hine v. Trevor*, 4 Id. 555, 572.

² See *Waring v. Clark*, 5 Howard, 441, 504; *The Magnolia*, 20 Id. 296, 343, 315; *Allen v. Newberry*, 21 Id. 245; *Maguire v. Card*, 21 Id. 218; *The Lottawanna*, 21 Wallace, 558, 609; *Lord v. The Steamship Co.*, 102 U. S. 541.

³ 21 Howard, 244.

⁴ *Maguire v. Card*, 21 Howard, 248.

"The exclusive jurisdiction of the court in admiralty cases was conferred on the National Government, as closely connected with the grant of the commercial power. It is a maritime court, instituted for the pur-

In *Maguire v. Card*,¹ the supplies which gave rise to the controversy were furnished to a steamer trading between ports and places on the Sacramento River, which has its entire course in California. The court held that the contract, like that in *Allen v. Newberry*, concerned the internal trade of the State, and must be governed by the same principles. There was no good reason for extending the jurisdiction of the admiralty over such contracts. From the case of *Gibbons v. Ogden*² down, it had been conceded that, according to the true interpretation of the commercial power, it does not extend to the purely internal traffic of a State, which is necessarily left to the local legislature. To subject it therefore to the jurisdiction of the admiralty would extend the judicial power of the United States beyond the legislative, and require the federal courts to enforce the municipal laws, or laws of the States, as to matters which concern them and are beyond the scope of the General Government.³

The decisions now incline to a broader rule, more in harmony with the objects which the government of the United States was intended to promote.⁴ The grant of judicial power includes "all cases of admiralty and maritime jurisdiction;" and since vessels were equally subject to the authority of the admiralty as it was administered in England and on this side of the Atlantic, whether the voyage was

pose of administering the law of the seas. There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contract, to those concerning the navigation and trade of the country upon the high seas, etc., with foreign countries, and among the several States. Contracts growing out of the purely internal commerce of the State, etc., are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts." *The New Jersey Navigation Co. v. Merchants' Bank*, 6 Howard, 344; *Allen v. Newberry*, 21 Id. 244, 251.

¹ 21 Howard, 248.

² 9 Wheaton, 194.

³ See *ante*, pp. 430, 439, 442; *The Trade-Mark Cases*, 100 U. S. 82; *Steamship Co. v. Lord*, 102 Id. 541.

⁴ *The Lottawanna*, 21 Wallace, 558; *The Commerce*, 1 Black, 574; *The Belfast*, 7 Wallace, 624, 646.

between ports of the same or to a foreign country, the rule should — now that navigability is made the test, instead of the ebb and flow of the tide — be extended to navigable lakes and rivers.¹ It is the character of the traffic as internal, interstate, or foreign, and not whether it takes place over a road or river, by boat or railway, which must be considered in applying the commercial power; but admiralty jurisdiction has a wider scope, and may be exercised over all boats using the navigable waters of the United States.² Vessels use the same waters whether they are engaged in foreign or domestic trade; and as disorder and litigation would result if they were governed by different rules, Congress may make, and the admiralty enforce, such regulations as are requisite to give certainty to title, maintain order, and prevent the collisions which may be as disastrous on a river as at sea. The craft which is plying to-day between places in the same State may to-morrow extend her voyage to another, or proceed to sea; and it is therefore essential that she, in common with all others which are or may be engaged in coasting or foreign trade, shall be governed by the same rules.³

It is on such grounds that Congress may enact that sales and mortgages of vessels shall be invalid as against *bona fide* purchasers, unless they are duly registered at the custom house; prescribe the number and character of the boats which each must carry, and the lights which they must show; and require the machinery and boilers of steamers to be inspected by an officer of the government and certified by him. And the statute may be enforced in the admiralty whether the voyage is between ports of the same or of a different State.⁴

¹ The Belfast, 7 Wallace, 624.

² The Belfast, 7 Wallace, 624; The Magnolia, 20 Howard, 296.

³ See The Lottawanna, 21 Wallace, 558, 609.

⁴ See Shaw v. McCandless, 36 Miss. 296; Richardson v. Montgomery, 49 Pa. 203; The Providence & N. Y. Steamship Co. v. Hill Manufacturing Co., 109 U. S. 578, 607; White's Bank v. Smith, 7 Wallace, 616. See *ante*, p. 109.

The case may seemingly be summed up as follows: A ship is potentially an instrument of interstate and foreign commerce, whether she is or is not actually so employed, and as such subject to the jurisdiction of the General Government. Highways are under the control of the States when on land, but they may be regulated by Congress, or through the admiralty, when they consist of the navigable waters of the United States. Regard must be had, in determining whether a suit can or cannot be maintained in the admiralty, to the locality where, and the nature of the tort or contract out of which, the controversy arose; and if these give jurisdiction, it is immaterial that the voyage lay between ports in the same State.¹ In the case of *The Commerce*² it was contended that the proceeding must fail, because the collision occurred on the Hudson River within the body of the county, and it did not appear that either of the vessels was engaged in foreign commerce, or commerce among the several States; but the court held that the judicial power conferred by the Constitution in all cases of admiralty and maritime jurisdiction might be exercised over every vessel trading on the navigable waters of the United States. The test "is locality where the cause of action arises *ex delicto*; and if it appears in cases of collision, depredations upon property, illegal dispossession of ship, or seizures for violation of the revenue laws, that the wrongful act was committed on navigable waters within the admiralty and maritime jurisdiction of the United States, the case is properly cognizable in the admiralty."³

So far the conclusion is essential to the best interests of all concerned, which would be imperilled if vessels navigating the same waters were not governed by a common rule; but it has been decided on less convincing grounds that if the contract relates to navigation, — as being of affreight-

¹ See *The Commerce*, 1 Black, 574; *The Belfast*, 7 Wallace, 624, 637; *The Lottawanna*, 21 Id. 558, 587; *The Insurance Co. v. Dunham*, 11 Id. 1, 23, 29; *Ex parte Boyer*, 109 U. S. 629; *Henry's Admiralty Jurisdiction and Procedure*, sections 11, 12, 13.

² 1 Black, 574.

³ *The Belfast*, 7 Wallace, 624, 640.

ment or for supplies, — the admiralty jurisdiction may attach whether the termini of the voyage are in the same or different States.¹ In the case of *The Belfast* a libel was filed in the City Court of Mobile against a steamboat for the loss of bales of cotton which had been shipped by river from Vienna in the State of Alabama to Mobile in the same State, and a decree rendered for the plaintiff; but the proceeding was set aside by the Supreme Court of the United States on the ground that a contract for the transportation of goods by water from one place to another may be enforced by a suit *in rem* against the vessel in the federal courts, though both ports are in the same State, and no part of the voyage is in any other State or foreign country; and as their jurisdiction is exclusive whenever it is sought to charge the vessel, no such proceeding can be instituted in a State tribunal. The contract viewed as such was internal, and not subject to the commercial power of the General Government; but inasmuch as it was to be carried into effect by navigation on the waters of the United States, it came within the grant of admiralty and marine jurisdiction. Whatever the rule may be, when the contract is for the transportation of goods from one point in a State to another, above the ebb and flow of the tide, there can be no doubt that when the way, or any considerable part of it, is on the ocean, it and the vessel are under the jurisdiction of the admiralty, and may be regulated by Congress whether the termini are in the same or in different States.²

In *Lord v. Steamship Co.* an act limiting the liability of owners of vessels not used in river or inland navigation for maritime torts to the amount of the value of their interest in the vessel and her freight, was sustained on the ground that it only related to navigation on the ocean, which is beyond the control of the States, and must be regulated by Congress. The case of *Carr v. McGuire* was cited as authoritative; and the language of the Chief-Justice might seem

¹ *The Belfast*, 7 Wallace, 624, 642.

² See *Lord v. Steamship Co.*, 102 U. S. 541.

to imply that vessels trading above the ebb and flow of the tide cannot constitutionally be brought within the jurisdiction of the admiralty unless they are engaged in interstate or foreign commerce. But the decision turned on the validity of the act under the commercial power, and does not show that the police power — which, though generally reserved to the States, is, from the necessity of the case, lodged in Congress, as regards navigation — may not be exercised through the admiralty on all vessels using the navigable waters of the United States.¹

In considering the decisions on this point it should be

¹ The principle is clearly stated in the following extract from Henry's Admiralty Jurisdiction and Procedure, section 12: "Neither the lakes nor the public rivers of the United States are in the federal sense highways of the State. A vessel after leaving a port of a State on a public river is on a national highway, subject to State jurisdiction for some limited police purposes, which are subordinate to the paramount right of navigation; and the navigable rivers are as much national highways as the high seas are international. The littoral jurisdiction of a State, although extending for some purposes beyond low-water mark, is subject to the paramount right of navigation as a highway of the nation, in the same manner as the sea within the three mile zone from the shore is subject to the right of navigation by foreigners without becoming subject to the local law. Such waters are considered as the common highway of nations, and the jurisdiction of the local authorities exists only for the protection of the coast and its inhabitants, — not to subject passing vessels to the local law of the government of the shore. *The Queen v. Keyn*, L. R. 2 Exch. Div. 63, opinion by Cockburn, Ch.-J.; *The General Iron Screw Collier Co. v. Schurmanns*, 1 John & H. 180; *The Twee Gebroeders*, 3 C. Rob. 336. In *The Saxonia*, Lush. 410, a collision between a foreign and an English vessel in the waters of Solent was treated as if it had occurred on the high seas, and was governed by the general maritime law, and not by the English statute in force in that place, which was held only applicable to British vessels. Such rivers within the boundaries of a State are navigable waters of the United States, and are national and not State highways; and the control of the General Government extends over all vessels engaged in their navigation where such rivers may be made the means of interstate commerce: and even canals are now considered public waters over which the admiralty jurisdiction extends." *The Daniel Ball*, 10 Wallace, 557; *Veazie v. Moor*, 14 How. 568; *The Belfast*, 7 Wallace, 624; *In re Long Island Trans. Co.*, 5 Fed. Rep. 599; *Ex parte Boyer*, 109 U. S. 629.

remembered that although a grant of judicial power cannot be enlarged by legislation, Congress may prescribe how much of it shall be exercised at a given period, and by what means. As was said in the case of *The Magnolia*,¹ "The Constitution, in defining the powers of the courts of the United States, extends them to "all cases of admiralty and maritime jurisdiction." It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only. Consequently, as Congress had never before 1845 conferred admiralty jurisdiction over the northern fresh-water lakes *not* "navigable from the sea," the district courts could not assume it by virtue of this clause in the Constitution. An act of Congress was therefore necessary to confer this jurisdiction on those waters, and was completely within the constitutional powers of Congress, — unless by some unbending law of nature, fresh-water lakes and rivers are necessarily within the category of those that are not "navigable," and which, consequently, cannot be subjected to admiralty jurisdiction any more than canals or railroads.

To constitute a navigable water of the United States, it must, of itself or by its connection with other waters, form a continuous highway over which commerce is or may be carried on with other States or foreign countries through the customary means of navigation. If it does afford such a communication, it and vessels traversing on it are subject to the jurisdiction of the admiralty. If it does not, and is only navigable between different places within the same State, it is not a navigable water of the United States. Hence boats borne on such a stream, or on a lake in the interior of a State with no navigable outlet, are not included in the grant

¹ 20 Howard, 296, 300.

of maritime and admiralty jurisdiction, and can be regulated by Congress only when forming links in interstate or foreign commerce.¹

The question has been variously considered, and it seems to have been thought at one period that a stream could not be treated as a navigable water of the United States unless it afforded an uninterrupted means of communication with other States and foreign countries before its channel was artificially deepened or improved; but it is now settled that a vessel is not less an instrument of commerce within the jurisdiction of the United States, because the river on which it floats has been rendered navigable by locks and dams;² and from this there is but a single step to holding that the rule includes canals when forming a connecting-link between navigable waters of the United States.³ The canal, at all events, when chartered or constructed by the State, is under her control, but the boats which pass through it may be regulated by Congress, and are subject to admiralty jurisdiction.⁴

In *Ex parte Boyer*⁵ the District Court of the United States, sitting in admiralty, was held to have jurisdiction of a suit *in rem* against a steam canal-boat, to recover damages caused by a collision between her and another canal-boat while both were navigating a canal which had been constructed to unite the waters of Lake Michigan with the Mississippi, — although the libellant's boat was bound to a port in Illinois from another port in the same State. Blatchford, J., said: —

“Navigable water, situated as this canal is, used for the purposes for which it is used, — a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, — is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred

¹ The *Montello*, 11 Wallace, 411, 415.

² The *Montello*, 11 Wallace, 411; 20 Id. 140.

³ *Ex parte Boyer*, 109 U. S. 629.

⁴ See *The Daniel Ball*, 10 Wallace, 557; *Railroad Co. v. Maryland*, 21 Id. 456, 471; *Sands v. Manistee River Improvement Co.* 123 U. S. 288.

⁵ 109 U. S. 629.

by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State."

Although Congress may regulate the navigable waters of the United States as the means of commercial intercourse and ways for the passage of vessels, the ownership of the water, of the fish which it contains, and of the soil beneath, remains in the States.¹ A State law, therefore, regulating the public right to catch fish over the soil of the State below low-water mark, or prohibiting the inhabitants of other States from gathering oysters in any of its bays, rivers, or waters, is not repugnant to the grant of admiralty and maritime jurisdiction, or to any other clause or article of the Constitution.²

For analogous reasons the admiralty cannot take cognizance of cases where the damage is wholly on land, or to a structure affixed to the soil, and forming part of that mass of property which is subject to the police and judicial power of the States; as, for instance, where a bridge or wharf is injured by a passing vessel,³ or where a fire originating on board of a ship is communicated to the buildings near which she is moored.⁴ But redress may be had in the admiralty for an injury to a vessel from a bridge, wharf, or other structure, which injuriously obstructs the channel, or from a defect in the dock wherein she lies, or from piles left negligently in the bed of the stream.⁵

¹ See *ante*, p. 514; *McCready v. Virginia*, 94 U. S. 391; *United States v. Bevans*, 3 Wheaton, 336.

² *Smith v. Maryland*, 18 Howard, 71. See *ante*, p. 512.

³ *The C. Accame*, 20 Fed. Rep. 642.

⁴ *The Plymouth*, 3 Wallace, 20; *The Ottawa*, 1 Brown Ad. Rep. 356.

⁵ *The Philadelphia, Wilmington, & Baltimore R. R. Co. v. Tow Boat Co.*, 23 Howard, 209; *Atlee v. Packet Co.*, 21 Wallace, 389; *Rock Island Bridge Co.*, 6 Id. 213; *Leathers v. Blessing*, 105 U. S. 626; *Henry's Admiralty Jurisdiction and Procedure* sect. 26.

Floating structures which, though not engaged in the transportation of goods or passengers, are ancillary to navigation have sometimes been treated as within the rule, on the maxim that jurisdiction should be judicially enlarged, rather than justice should fail; but in *Cope v. The Valette Dry-Dock Co.*,¹ a floating dry-dock, constructed for the purpose of raising ships out of the water for repairs, and having no means of propulsion of its own, though susceptible of being towed from place to place as occasion might require, was held to afford no more ground for the exercise of admiralty jurisdiction *in rem* or *in personam* than if it stood on the soil. It seems, however, that a hopper-barge, or dredge, used for deepening the channel, and customarily towed for that end to any port where its services are needed, may be the subject of a claim for salvage, although not provided with sails, oars, engines, or motive power of any other kind.²

The jurisdiction includes marine torts occasioned by the default of the owner, crew, or master of an American vessel, or in which she is involved, whether committed forcibly or through negligence, in whatever part of the globe they may occur; and may be exercised, although the injury was inflicted after the termination of the voyage, or on the waters of a foreign power, and might have been redressed under its laws.³ Cognizance may also be taken of controversies between foreign vessels arising from a collision or other marine tort, on the general principle — which applies with greater force to contracts — that the courts should afford a remedy where they have jurisdiction of the thing or the parties, in order to prevent the failure of justice which may result from delay.⁴ Whether relief will be given in such cases nevertheless depends on the circumstances, which should be carefully considered; and if the court errs in the exercise of its

¹ 119 U. S. 625.

² *The Mac*, 7 P. D. 126; *Cope v. The Valette Dry Dock Co.*, 119 U. S. 625, 630.

³ See *Leathers v. Blessing*, 105 U. S. 626; *The Eagle*, 8 Wallace, 15.

⁴ *The Belgenland*, 114 U. S. 355; *Mason v. The Blaireau*, 2 Cranch, 240; *The Jerusalem*, 2 Gallison, 191; 1 Smith's Lead. Cas. (8th Am. ed.).

discretion, the decision may be reversed under a writ of error.¹

The jurisdiction of the admiralty is so far exclusive that whenever it does or might attach *in rem* or *personam*, no proceeding can be instituted specifically against the vessel in a national or State tribunal, either customarily or under an authority conferred by statute.² The rule admits of no exception, and applies even where, as in the case of supplies furnished at a home port, the ship cannot be libelled under the powers conferred by the Constitution and laws of the United States, and the right to charge her is derived from State legislation.³ The courts of common law or of equity may entertain a suit *in personam*, on a maritime contract, and execute the decree or judgment by attaching the vessel, or taking it in execution, as in the case of other chattels;⁴ but they cannot proceed against the vessel *in rem*, or affect it with a lien, except through their jurisdiction over the person of the owner.⁵ A levy on a vessel by the sheriff, followed by a proceeding in the admiralty *in rem*, may place both courts in an embarrassing position, by rendering it difficult to ascertain whether the writ which was served last in point of time is or is not prior as regards right;⁶ and such controversies would be inevitable if the State tribunals or federal courts of common law were authorized to proceed *in rem*. As jurisdiction is now distributed, the question cannot well arise, because writs

¹ The *Belgeuland*, 114 U. S. 355.

² The *Moses Taylor*, 4 Wallace, 411; The *Hine v. Trevor*, Id. 556; The *Josephine*, 39 N. Y. 19, 27; *Brookman v. Hamill*, 43 Id. 554, 555.

³ The *Josephine*, 39 N. Y. 19, 27; *Brookman v. Hamill*, 43 Id. 554, 555; The *St. Lawrence*, 1 Black, 522; The *Belfast*, 7 Wallace, 624, 646; The *Hine v. Trevor*, 4 Id. 555; The *Moses Taylor*, Id. 411.

⁴ *Carryl v. Taylor*, 24 Pa. 259; 20 Howard, 583; *Leon v. Galceran*, 11 Wallace, 185.

⁵ *Brookman v. Hamill*, 43 N. Y. 554, 565; The *Belfast*, 7 Wallace, 624, 646.

⁶ See *Carryl v. Taylor*, 24 Pa. 259; 20 Howard, 583; 2 Smith's Leading Cases, 973 (8th Am. ed.); The *Robert Fulton*, 1 Paine, 620; *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578; also Hildreth's History of the United States, pp. 155, 164.

of *feri facias*, and foreign attachments, are not *in rem*, but against the interest of the defendant in the thing; and they do not bind the rights of third persons, or preclude a sale under subsequent proceedings in the admiralty, which will divest prior liens, and confer a title against all the world.¹

Such at least should be the result logically, though it was decided in *Taylor v. Carryl* that a vessel which has been taken in execution by the sheriff under a *feri facias*, or attachment from a State court, is within the rule that the tribunal which first obtains jurisdiction will retain it to the end, and that a subsequent seizure by the marshal, under a libel for mariners' wages, will not enable the admiralty to proceed *in rem*, or order a sale that will supersede the rights arising under the levy made by the sheriff.² Taney, Ch.-J., dissented for reasons which appear unanswerable, and the only ground on which the decision can be upheld is that the State court had ordered the vessel to be sold as perishable before the libel was filed, and thus obtained the jurisdiction *in rem* which did not exist under the attachment.³ The question arose in the *Providence & New York Steamship Co. v. Hill Manufacturing Co.*,⁴ under the act of 1851, providing that the liability of owners of vessels in the cases therein enumerated "shall in no case exceed the amount of their interest in the ship or vessel;" and it was held that as the object of the act could not be effected if suits could be brought in the State courts, the jurisdiction of the admiralty was necessarily exclusive. It followed that filing a libel in the District Court of the United States in pursuance of the act superseded an action which had been brought in the Supreme Court of Massachusetts for the loss by fire of goods which were shipped at Providence on board the defendant's steamer

¹ See *The Moses Taylor*, 4 Wallace, 411, 431; *Taylor v. Carryl*, 20 Howard, 583, 617; *The Hine v. Trevor*, 4 Wallace, 555, 571; *Woodruff v. Taylor*, 20 Vt. 65; *Leon v. Galceran*, 11 Wallace, 185; *Castrique v. Imrie*, 8 C. B., n. s. 1; *The City of Mecca*, L. R. 6 P. D. 106.

² See *The Oliver Jordan*, 2 Curtis, 414; *Keating v. Spink*, 8 Ohio St. 105.

³ 2 Smith's Lead. Cas. (8th Am. ed.) 911.

⁴ 109 U. S. 578.

"Oceanis" for transportation to New York, and that on serving the plaintiff with a monition from the admiralty to proceed no further with the suit, it became his duty to obey, and the judgment subsequently rendered in his favor by the Massachusetts court might be reversed by the Supreme Court of the United States. The claim was virtually for the distribution of a fund, and justice could not be done without bringing it before a tribunal authorized to cite all the parties and to award each his share. Relief was formerly given in England in such cases through a bill in equity, but might now be attained in both countries in the admiralty, which was clothed for such purposes with chancery powers. Whether the prohibition of injunctions from the Federal to the State courts in the Judiciary Act of 1789 did or did not apply to proceedings under the act of 1851, when the libel in the admiralty was given in evidence the State court should have obeyed the act of Congress which declared that all other proceedings should cease.

The extension of admiralty jurisdiction to torts and contracts which were originally beyond such cognizance, does not oust the courts of common law or preclude the injured party from instituting a suit *in personam* in either jurisdiction.¹ Covenant may accordingly be brought in a State court on a charter party, or assumpsit for a sailor's wages,² or an action on the case for a collision,³ or for an injury inflicted on a passenger through the negligence of the master or mariners.⁴ Such at least is the rule under the saving clause of the Judiciary Act of 1789;⁵ but it might presumably be changed by Congress, because where the case falls within the grant of judicial power the jurisdiction of the federal courts may, speaking generally, be made exclusive.⁶

¹ The Belfast, 7 Wallace, 624, 646.

² Leon v. Galcoran, 11 Wallace, 85.

³ Schoonmaker v. Gilmore, 102 U. S. 118.

⁴ The Belfast, 7 Wallace, 624, 645.

⁵ American Steamboat Co. v. Chase, 10 Wallace, 522; Schoonmaker v. Gilmore, 102 U. S. 118.

⁶ Martin v. Hunter, 1 Wheaton, 304, 382; The Moses Taylor, 4 Wallace, 411, 431.

Congress or a State legislature may enlarge the remedy on maritime contracts by authorizing proceedings *in rem* under circumstances where (as in the case of supplies furnished at a home port) such a suit would otherwise fail, and the remedy may then be enforced in the admiralty; but contracts which, from their nature, are not subject to admiralty jurisdiction, cannot be brought within it by legislation, because the jurisdiction of the federal courts is defined by the Constitution, and cannot be carried farther by the States or the General Government.¹ Contracts to do work or furnish materials for the construction of a ship fall under this head, although she is to be launched, and delivered after she is afloat.² And it has been held to follow that a State law may give the contractors and material men a lien, and authorize them to enforce it by a proceeding *in rem*, — which must be instituted in the local courts, and cannot be maintained in the admiralty.³ Such a result would seem questionable, because the lien so created may endure after the vessel has proceeded on her voyage, and conflict with liens arising under the maritime law.

While locality is so far the test of jurisdiction that no recovery can be held in the admiralty either in tort or contract, unless the waters are those of the United States or form part of the ocean which is the common highway of all nations, the fulfilment of this condition will not give the admiralty courts jurisdiction when the cause of action does not fall in other respects within the customary and recognized powers of such tribunals.⁴ A contract for the construction of a vessel is an instance of this kind; and another may grow out of the

¹ *People's Ferry Co. v. Beers*, 20 Howard, 393; *Roach v. Chapman*, 22 Id. 129; *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wallace, 558, 609.

² *Roach v. Chapman*, 22 Howard, 129; *People's Ferry Co. v. Beers*, Id. 393; *Foster v. The Richard Busteed*, 100 Mass. 409; *Edwards v. Elliott*, 34 N. J. Law, 96, 99; 21 Wallace, 532, 558; *Sheppard v. Steele*, 43 N. Y. 52; *Brookman v. Hamill*, Id. 554, 565.

³ *Sheppard v. Steele*, 43 N. Y. 52; *Edwards v. Elliott*, 34 N. J. Law, 96; 21 Wallace, 532; *Scull v. Shakespear* 75 Pa. 297, 304.

⁴ *The Orleans v. Thomas-Phœbus*, 11 Peters. 175.

death of a member of a family owing to the negligence or misfeasance of the master or crew of the vessel against which the libel is filed. The right of action became extinct at common law on the death of the person who had sustained the injury, and a suit could not be maintained by his executors or the surviving members of the family, however real their loss.¹ The Pennsylvania legislature provided, in 1855, that whenever death was occasioned by unlawful violence or negligence, the husband, widow, or parents of the deceased might recover damages in an action brought within one year after the death, and not later; and similar acts have been passed in many of the other States. In the recent case of *The Harrisburg*² the question arose in a proceeding instituted by the widow and children of Silas Ricards against the steamer, "Harrisburg," to obtain compensation for his death from a collision in Vineyard Sound with another vessel, which was alleged to have been caused by the steamer's negligence; and it was held that the suit stood exclusively on the statute, and must fail because it was not instituted until after the lapse of the time which it prescribed. Waite, C. J., said: —

"The maritime law, as accepted and received by maritime nations generally has not established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind; and we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law. The rights of persons in this particular under the maritime law of this country are the same as at common law; and as it is the duty of courts to declare the law and not to make it, we cannot change the rule."

The admiralty may also take cognizance of seizures of goods and chattels as enemy's property, or forfeited to the United States for a breach of a law or rule made by Con-

¹ *Insurance Co. v. Brame*, 95 U. S. 754; *Goodsell v. The Hartford and New Haven R. R. Co.*, 33 Conn. 51; *Green v. Hudson River R. R. Co.*, 2 Keyes, 294.

² 119 U. S. 199.

gress.¹ The jurisdiction is, in the first instance, exclusive ; but should the result be an acquittal, recourse may be had to a common-law action in a State or federal tribunal.² It was this branch of admiralty jurisdiction which brought the court into disrepute in England, as proceeding arbitrarily without a jury, and exercising a power which was abused. And the case of *Miller v. The United States* indicates that it may be employed not less injuriously here as a means of confiscation on the *ex parte* affidavits of informers, without actual notice to the parties concerned, or an opportunity for a hearing.

¹ *Hoyt v. Gelston*, 3 Wheaton, 248; *Miller v. The United States*, 11 Wallace, 268; *Tyler v. Defrees*, Id. 331.

² *Hoyt v. Gelston*, 3 Wheaton, 324; *Slocum v. Mayberry*, 2 Id. 9.

LECTURE XLVII.

Jurisdiction from the Character of the Parties. — Suits by and against the United States. — Ambassadors and Consuls. — Where a State is a Party. — Controversies between Citizens of different States. — To give Jurisdiction on this ground, each Party on one side must be of a different State from all on the other. — Where such is the case, the Distribution of an Estate, the Probate of a Will, Compensation under the Right of Eminent Domain, and Pecuniary Demands, are equally within the Jurisdiction of the Circuit Courts. — Corporations are citizens of the States by which they are created. — Ancillary Proceedings between Citizens of different States. — Residence not necessarily Citizenship. — Federal Courts limited, but not inferior. — Where the Record does not show Jurisdiction, the Judgment is erroneous, though not void. — Judgments without Jurisdiction are null, and may be set aside Collaterally.

THE remaining ground on which the federal courts may exercise a concurrent or exclusive jurisdiction is the character of the parties, which may render it necessary or expedient that the case should be withdrawn from the State courts and submitted to a national tribunal. It would, for instance, be altogether inconsistent with the sovereignty of the United States as defined in the Constitution, if the National Government were obliged to sue in the State tribunals. Where a law of the United States is violated the subject-matter of the controversy gives the federal courts jurisdiction; but the United States should obviously be spared the necessity of appearing as plaintiffs or defendants in the State courts, in suits arising under the local laws. The terms of the grant are therefore general, extending to all cases in which the United States are parties. These words are broad enough to include suits against the United States, as well as cases in which they appear as plaintiffs; but Congress did not think fit to provide means for the execution of

the former branch of the power, and hence a suit cannot be maintained against the General Government for any wrong done or right withheld by them or under their authority. This want has to a great extent been remedied by the organization of a court of claims as the arbiter of controversies which from the sovereignty of the defendant cannot be determined in the ordinary course of law. The judgments of this tribunal are conclusive as to the merits of all demands against the United States arising *ex contractu*, subject to an appeal to the Supreme Court of the United States; and though they cannot be enforced by process, are payable on the presentation of a certified copy of the writ, if any general appropriation has been made for the satisfaction of private claims.¹ The jurisdiction does not, however, extend to all claims which Congress ought to provide for in morals and good conscience, and only embraces such as are cognizable under the general principles of law and equity, and fall within the scope of the statutes by which the court was organized.²

Although the United States are by virtue of their sovereignty exempt from process, the principle does not apply to suits against their officers or agents for acts done or property taken or withheld on their behalf, unless the act was not only performed under an authority from the President or Congress, but the command was one that could constitutionally be given; and when such is not the case the defendant is simply a trespasser, and may be compelled to make amends in damages, or surrender what he cannot lawfully retain, as though no governmental right or question were concerned.³

It was also requisite to provide a common and impartial arbiter for the determination of controversies between the States. A suit against a sovereign in his own courts must

¹ Richardson's History of the Court of Claims (Washington, 1882), 7 Southern Law Review, N. S., 781. See *The United States v. Jones*, 109 U. S.

² See *Langford v. The United States*, 101 U. S. 341; *United States v. The Pacific R. R.*, 120 Id. 227, 241; *Great Western Ins. Co. v. United States*, 112 Id. 193.

³ *The United States v. Lee*, 106 U. S. 196; *Poindexter v. Greenhow*, 114 Id. 285; see *ante*, 889, 897.

depend on his good pleasure, and may meet with delays and impediments amounting to a denial of justice; and if the plaintiff succeeded in obtaining judgment there would still be no means of enforcing the decree. These reasons were stated with great clearness in the *Federalist*, No. 80, and shown to apply with peculiar force to controversies arising out of interfering claims of boundary between the States. If such disputes could not be brought before the courts of the Union there would be no effectual means of settlement, and the difficulty might result in intestine war. This branch of jurisdiction has been exercised on more than one occasion, and always with beneficial results.¹

There is still another class of cases requiring the intervention of the federal courts. An ambassador is *jure gentium* exempt from the operation of the local or municipal law. He stands for the time being in the place of the sovereignty which he represents, and should, like it, be free from restraint. If the privilege is disregarded without sufficient cause it is a ground of war; and the question whether such a cause exists should obviously be decided by a tribunal deriving its authority from the nation on which the burden of hostilities will fall.

All cases affecting ambassadors, other public ministers, and consuls, are therefore within the judicial power of the United States, which may, if Congress think fit, be made exclusive of the State tribunals.² One considerable object of the federal Constitution, as Chief-Justice Tilghman observed in *Manhardt v. Soderstrom*, was to vest in the United States the administration of the affairs by which we are related to foreign nations. To do this effectually the representatives of those nations must be under the protection of the United States; and as consuls, although not entitled to the privileges of ministers, often exercise important functions, they

¹ See *Rhode Island v. Massachusetts*, 15 Peters, 233; 4 Howard, 591; *Porter v. Fleeger*, 11 Peters, 185; *Missouri v. Iowa*, 7 Howard, 660, 10 Id. 1; *Missouri v. Kentucky*, 11 Wallace, 395; *Virginia v. West Virginia*, Id. 39; *Ex parte Devol Man. Co.*, 108 U. S. 401.

² *Manhardt v. Soderstrom*, 1 Binney, 138.

were included in the same clause, and enjoy the important privilege of suing in the Supreme Court of the United States, and of being exempt from suit in the State courts, although they may have recourse to them for redress. The grant of original jurisdiction to the Supreme Court in cases affecting the ministers of foreign powers does not, it seems, preclude Congress from conferring jurisdiction on the subordinate federal courts. The district courts of the United States may take cognizance of suits against consuls in their public character, and an action may be sustained in the circuit courts against an alien, although he be a consul.¹ As the object of the grant is to confer a privilege, and not to impose a disability, the representatives of foreign powers may choose the forum in which to sue, and a prosecution may be instituted in a circuit court of the United States for the offence of offering violence to an ambassador or other public minister.²

It was also requisite in a nation composed of many States, whose inhabitants might regard each other with jealousy or suspicion, to have some arbiter in whose fairness all would confide, and to whom every citizen might appeal in cases where he had reason to distrust the local tribunals. A citizen of one State suing in the courts of another might apprehend that he would not meet with even-handed justice, and even if the suspicion was unfounded it would tend to impair the cordiality which ought to exist throughout the Union. A similar evil might arise if a foreigner was obliged to seek redress in tribunals deriving their authority from the State where the wrong was inflicted. The judicial power of the United States was therefore extended to "controversies between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or citizens thereof and foreign States, citizens, or

¹ *Bors v. Preston*, 111 U. S. 252, 263. See *United States v. Ravara*, 2 Dallas, 297; *Graham v. Stucken*, 4 Blatchford, 50.

² *United States v. Ortega*, 11 Wheaton, 467. See *The Schooner Exchange v. M'Fadden*, 7 Cranch, 116.

subjects." In all these instances the parties might, with more or less reason, apprehend that the local courts would be partial, and jurisdiction was conferred on the national tribunals.

In determining who is a party within these provisions, regard will be had to the persons whose names appear of record as the legal plaintiffs or defendants, and not to the persons for whose use the suit is brought, or whose interest will be affected by the result.¹ This rule may not always effect the purpose which the Constitution had in view, but it is the best that can be adopted under the circumstances. If controversies between citizens of the same State could be brought within the reach of the federal courts by assigning the cause to a resident in another State, their jurisdiction might be indefinitely extended, and that of the State courts rendered precarious.² The first section of the Judiciary Act of March 3, 1887, declares, "nor shall any district or circuit court have cognizance of any suit (except upon foreign bills of exchange) to recover the contents of any promissory note, or other chose in action, in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made;"³ and the previous statutes were nearly to the same effect.⁴ These provisions are not restricted to actions at law, but include bills in equity to foreclose mortgages, or to compel the specific performance of agreements.⁵

A controversy exists within the meaning of the Constitution wherever any property or claim of the parties capable

¹ *Osborn v. The United States Bank*, 9 Wheaton, 857.

² *Barney v. Baltimore City*, 6 Wallace, 280; *Williams v. Nottaway*, 104 U. S. 209; *Bernard's Township v. Stebbins*, 109 Id. 341.

³ See 120 U. S. Appendix, 788.

⁴ See *Bushnell v. Kennedy*, 9 Wallace, 387, for the rule when the demand assigned is *ex delicto*.

⁵ *Sheldon v. Sill*, 8 Howard, 441; *Corbin v. Black Hawk County*, 105 U. S. 659; *Bernard's Township v. Stebbins*, 109 Id. 341, 354.

of pecuniary estimation is the subject of litigation, and is presented by the pleadings for judicial determination;¹ and a case between parties from different States will therefore not be less within the jurisdiction of the federal courts, originally or through removal, because it arises in the course of proceedings for the distribution of an estate among the heirs, or next of kin, or the appropriation of private property for the opening of a street or other public use.² When, therefore, a controversy with regard to the distribution of a decedent's estate, or the validity of his will involves a federal element, or when all the litigants on one side are citizens of a different State from those on the other, the proceeding may be instituted in or removed to the Circuit Court, notwithstanding the delay, expense, and inconvenience incident to such a change.

The phrase "controversies between citizens of different States" may mean that all the parties on one side must be of a different State from those on the other, or that it is enough if one or more of them are of different States, no matter where the others reside or are domiciled. Either view seems to be admissible, but the courts have inclined to the former interpretation; and when the point arose in the Removal Cases,³ the court so construed the words of the second section of the act of March 3, 1875, which are identical with those used in the Constitution, and adhered to this construction in *Blake v. McKim*,⁴ though all the defendants united in the petition. Such a conclusion was the more natural because the act of 1875 flooded the courts with a multitude of causes foreign to its legitimate province as the guardian and interpreter of the Constitution, and produced a delay which in some instances was equivalent to a denial of justice.⁵

¹ *Gaines v. Fuentes*, 92 U. S. 10, 27.

² *Boom Co. v. Patterson*, 90 U. S. 403; *The Pacific Railroad Removal Cases*, 115 U. S. 1, 25; *Searl v. School District*, 124 Id. 197.

³ 100 U. S. 457.

⁴ 103 U. S. 336.

⁵ See *Sheldon v. Sill*, 8 Howard, 441; *Barney v. Baltimore City*, 6 Wallace, 280; *The Sewing Machine Co.*, 18 Id. 553; *Williams v. Nottaway*, 104 U. S. 209; *Bernard's Township v. Stebbins*, 109 Id. 341; *The Removal Cases*, 100 Id. 457; *Blake v. McKim*, 103 Id. 336, 339.

Under the Judiciary Act of 1789 the right of removal was confined to the defendant, and a suitor who came as a plaintiff into a State court could not transfer the cause to a circuit court, although the opposite party was a citizen of the State, and might be unduly favored by her tribunals. The act of 1867 provided that where the controversy was between a citizen of the State where the suit was brought and a citizen of another State, the latter, whether plaintiff or defendant, might, on filing an affidavit that he had reason to apprehend prejudice or local influence, remove such suit into the Circuit Court. This act was elaborately reviewed in the case of *The Sewing Machine Co. v. Mr. Justice Clifford*, who held that it was nearly analogous to the act of 1879 and should receive a like construction, and that no cause could be removed under its provisions if any person on either side was from the same State with one or more of the persons on the opposite side. This view has been adhered to throughout the subsequent course of decision;¹ and was confirmed in *The Cambria Iron Co. v. Ashburn*,² and in *The Bible Society v. Grove*.³

In the Removal Cases⁴ the provision of the act of March 3, 1875, that "in any suit of a civil nature . . . in any State court . . . in which there shall be a controversy between citizens of different States, . . . either party may remove said suit into the Circuit Court of the United States," — was held to mean that "when the controversy is between citizens of one or more States on the one side and citizens of other States on the other side, either party to the controversy may remove the suit to the Circuit Court without regard to their position on the record as plaintiffs or defendants;" thus giving the phrase "between citizens of different States" the same interpretation which that phrase had received when like questions arose under prior acts. Bradley, Swayne, and Strong, JJ., concurred in the judgment, but dissented from so much of

¹ *Vannevar v. Bryant*, 21 Wallace, 41; *Myers v. Swann*, 107 Id. 546.

² 118 U. S. 54, 57.

³ 101 Id. 610.

⁴ 100 Id. 457.

the opinion as assumed that one condition of federal jurisdiction in the removal of a cause from a State court under the first clause of section 2, act of 1875, is that "each party on one side of the controversy must be a citizen of a different State from that of which any of the parties on the other side is a citizen."¹

The question whether a case in which any party on either

¹ "This portion of the act," said Bradley, J., "gives the right of removal in any suit in which there is a controversy between citizens of different States. In my judgment, such a controversy exists whenever any of the parties are citizens of a different State or States from that of which any of the parties on the other side are citizens. It is true, if there are other parties on opposite sides of the controversy who are citizens of a common State, it may also be a controversy between citizens of the same State. In other words, a controversy may be, at the same time, both a controversy between citizens of the same State and between citizens of different States. But the fact that it is both does not take away the federal jurisdiction. Neither the Constitution nor the law declares that there shall not be such jurisdiction if any of the contestants on opposite sides of the controversy are citizens of the same State; but they do declare that there shall be such jurisdiction if the controversy is between citizens of different States. The gift of judicial power by the Constitution, and the gift of jurisdiction by the law, are in affirmative terms; and those terms include as well the case when only part of the contestants opposed to each other are citizens of different States, as that in which they are all of different States. And I see no good reason why both the Constitution and the law should not receive a construction as broad as that of the terms which they employ. On the contrary, I think there is just reason for giving to those terms their full effect. The object of extending the judicial power to controversies between citizens of different States was, to establish a common and impartial tribunal, equally related to both parties, for the purpose of deciding between them. This object would be defeated in many cases if the fact that a single one of the many contestants on one side of the controversy being a citizen of the same State with one or more of the contestants on the other side, should have the effect of depriving the federal courts of jurisdiction. This absurdity became so glaring under the construction formerly given by this court to the Judiciary Act of 1789, in the case of corporations, when every stockholder was held to be a party, that the court was at length impelled to regard a corporation as a citizen of the State which created it, without regard to the citizenship of its members, — thus getting rid of the troublesome stockholder who happened to be a citizen of the same State with the opposite party, and who almost always appeared in the case."

side is a citizen of a different State from any one or more of the parties on the other side is within the grant of judicial power to the United States, although all the other parties are from the same State, was not necessarily at issue in these instances, which turned on the language of the enactments made to carry the power into effect ; but such a construction would seem to be objectionable, as tending to deprive the citizens of a State of the benefit of its tribunals in cases arising under its laws and not involving any federal question.¹

The rule applies whether the cause of action is *ex contractu* or *ex delicto*, and although the defendants answer in pleading by tendering distinct issues, and the statutes regulating the course of procedure allow several judgments to be entered for one or more of the plaintiffs, so that the action may be maintained as to some of the parties and fail as to the others.²

It is now settled, contrary to the rule laid down in the earlier decisions, that for all the purposes of original jurisdiction or of removal, a corporation must be regarded as a citizen of the State by which it was created. The presumption is *juris de jure*, and cannot be overcome by proof that some or all of the incorporators are citizens of the same State as the parties on the other side of the record, and could not bring or remove the suit as individuals, or but for the corporate existence conferred by the charter.³ In *The Steam-ship Co. v. Tugman* ⁴ the rule was applied to companies chartered by a foreign government, and it was held that they may proceed in the federal courts whenever that privilege would be accorded to a citizen or subject of the country from which they derive their origin.⁵

¹ See *Bryant v. Rich*, 106 Mass. 180 ; *Sewing Machine Co.*, 18 Wallace, 553.

² *Louisville & Nashville R. R. Co. v. Ide*, 114 U. S. 52 ; *Pirie v. Tvedt*, 115 Id. 41, 45 ; *Sloane v. Anderson*, 117 Id. 275 ; *Thorn Wire-hedge Co. v. Fuller*, 122 Id. 535, 543.

³ *Marshall v. Baltimore & Ohio R. R. Co.*, 16 Howard, 314 ; *Louisville, Cincinnati, & Charleston R. R. Co. v. Letson*, 2 Id. 407 ; *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 286 ; *Insurance Co. v. Ritchie*, 5 Wallace, 541.

⁴ 106 U. S. 118.

⁵ "The underlying question in this case is, whether, within the mean-

Where a company is incorporated by two States, and a citizen of one of them proceeds against it in another, the suit is wholly among citizens of different States, because a charter has no extra-territorial operation, or rather, because any partiality which may arise from the defendants being established in the State where the action is instituted, can-

ing of the Constitution and of the statutes determining the jurisdiction of the circuit courts of the United States, and regulating the removal of causes from State courts, a corporation created by the laws of a foreign State may, for the purposes of suing and being sued in the courts of the Union, be treated as a 'citizen' or 'subject' of such foreign State. In *Ohio & Mississippi R. R. Co. v. Wheeler* (1 Black, 286), the court, speaking by Mr. Chief-Justice Taney, said that in the previous case of *Louisville, Cincinnati, & Charleston R. R. Co. v. Letson* (2 Howard, 497) it has been decided, upon full consideration, 'that where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible for the purposes of withdrawing the suit from the jurisdiction of a court of the United States.' *Marshall v. Baltimore & Ohio R. R. Co.*, 16 Howard, 314; *Covington Drawbridge Co. v. Shepherd*, 20 Id. 227; *Insurance Co. v. Ritchie*, 5 Wallace, 541; *Paul v. Virginia*, 8 Id. 168; *Railroad Co. v. Harris*, 12 Id. 65. To the rule, thus established by numerous decisions, the court adheres. Upon this branch of the case it is, therefore, only necessary to say that if the individual members of a corporation created by the laws of one of the United States are, for purposes of suit by or against it in the courts of the Union, conclusively presumed to be citizens of the State by whose laws that corporation is created and exists, it would seem to follow, logically, that the members of a corporation created by the laws of a foreign State should, for like purposes, be conclusively presumed to be citizens or subjects of such foreign State. Consequently, a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State." *Steamship Co. v. Tugman*, 106 U. S. 118.

It follows that if a State court refuses to make an order of removal at the instance of a company incorporated by another State or foreign government, and proceeds with the cause, the proceeding will be *coram non judice*; and a judgment rendered against the company must be reversed, although they did not protest against the refusal, and appeared before the referee to whom the suit was sent for adjudication.

not be supposed to be lessened by the fact that they are also chartered in another State.

Ancillary proceedings to regulate actions or judgments in the same court, or to ascertain who is the owner of property which has been seized or sold by the sheriff or marshal, take their color as regards jurisdiction from the suit of which they are an offshoot. If that is within the grant of judicial power to the United States, so also will the subsidiary proceeding be, although containing no federal element, and incapable of being maintained in a circuit court of the United States if it stood alone.¹ So a federal court may enjoin an abuse of its process, although the parties against whom relief is sought are citizens of the same State as the complainant.² This decision was cited and approved in *Freeman v. Howe*,³ where the principle was said to be "that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, — supplementary merely to the original suit out of which it arose, — and is maintained without reference to the citizenship or residence of the parties."⁴

If, on the other hand, the principal suit be in a State court, and exclusively cognizable there, the ancillary proceeding will have the same character, and cannot be removed to a federal court, whether the parties to it are or are not citizens of different States.⁵

In *The Bank v. Turnbull*,⁶ judgment was obtained in a Virginia court in a suit between citizens of the State, and a

¹ *Freeman v. Howe*, 24 Howard, 450; *Krippendorf v. Hyde*, 110 U. S. 276, 287; *Pacific R. R. Co. v. Missouri Pacific R. R. Co.*, 111 Id. 505; *Gumbel v. Pitkin*, 124 Id. 131.

² *Gue v. The Tidewater Canal Co.*, 24 Howard, 257.

³ 24 Howard, 450.

⁴ See *Buck v. Colbath*, 3 Wallace, 334; *Amis v. Myers*, 16 Howard, 492; *Sennoek v. Coe*, 23 Id. 117; *Dunn v. Clarke*, 8 Peters, 1; *Kendall v. Winsor*, 6 R. I. 453, 462. See 22 Wallace, 280.

⁵ *Bank v. Turnbull*, 16 Wallace, 190; *Krippendorf v. Hyde*, 110 U. S. 276, 287.

⁶ 16 Wallace, 190.

levy made on goods as the property of the defendant. They were claimed by a citizen of another State; and an interpleader having been ordered between him and the judgment creditor to ascertain the title, it was held that he could not transfer the issue to a federal court, because "it was merely auxiliary to the original action, and instituted to enable the court to determine whether its process had, as was claimed, been misapplied."

An action of assumpsit, or trespass *de bonis asportatis*, may be maintained in the circuit courts of the United States, although the pleadings do not disclose that the case involves a federal question, or arose under the Constitution and laws of the United States, if the fact appears in evidence or from the rulings of the judge; but where jurisdiction depends on the character of the parties, the necessary facts must be set forth by the pleader, and will not be inferred argumentatively in the absence of precise averment.¹ An allegation that the defendant is a corporation chartered by the State of Missouri, and that the plaintiffs reside in New York, is not therefore sufficient, because residence is not necessarily domicile or citizenship.² So a consul will not be presumed to be the subject of the foreign government by which he is appointed; and if jurisdiction depends on his alienage, it must be averred.³

For a like reason it is not enough to aver that the intestate was a citizen of another State, and that the plaintiff took out letters of administration, because jurisdiction depends on the domicile of the party, and not on the origin or locality of the demand for which the suit is brought.⁴ It is immaterial that

¹ *Brown v. Keene*, 8 Peters, 112; *Railway Co. v. Ramsey*, 22 Wallace, 322; *Briges v. Sperry*, 95 U. S. 401; *Robertson v. Cease*, 97 Id. 646; *Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Swan*, 111 Id. 379; *Everhart v. Huntsville College*, 120 Id. 223; *King Bridge Company v. Otoe*, 120 Id. 225.

² *Grace v. The American Central Insurance Co.*, 109 U. S. 278; *Everhart v. Huntsville College*, 120 Id. 223.

³ *Bois v. Preston*, 111 U. S. 252, 263.

⁴ *Continental Insurance Co. v. Rhoads*, 119 U. S. 237.

the objection is not made on either side, because the court will note that it exists, and proceed accordingly, — it being an inflexible rule that the judicial power of the United States must not be exerted in a case beyond its scope, although it is invoked by both parties.¹

It is not an objection to the institution of proceedings in the Circuit Court, on the ground of citizenship, to establish or controvert the validity of a will, or for the distribution of the assets of a decedent among the heirs or next of kin, that the court has no procedure adapted to such an end, and that proceedings of this nature are by the law and practice of the State confined to tribunals specifically established for the purpose, and answering to the English ecclesiastical courts. The argument *ab inconvenienti* will be presumed to have been considered by the legislature, and does not afford a sufficient ground for declining to fill the measure of the jurisdiction prescribed in the Constitution and conferred by Congress.²

The federal courts cannot take cognizance of any case which is not manifestly within the grant of judicial power to the United States;³ and when the question arises upon a writ of error or appeal, the presumption is against the jurisdiction of the court below, and if it does not appear affirmatively the judgment will be reversed.⁴ To justify the reversal

¹ *Mansfield, Coldwater, & Lake Michigan R. R. Co. v. Swan*, 111 U. S. 379; *King Bridge Company v. Otoe*, 120 Id. 225. See *The Dred Scott Case*, 19 Howard, 393, 663, where, however, the court authoritatively decided against the claimant's right, while holding that he had no standing in court.

² *Hyde v. Stone*, 20 Howard, 170; *Payne v. Hook*, 7 Wallace, 425; 14 Id. 252; *Gaines v. Fuentes*, 92 U. S. 10; *Ellis v. Davis*, 109 Id. 485, 501.

³ *Bingham v. Cabot*, 3 Dallas, 383; *Abercrombie v. Duprees*, 1 Cranch, 343; *Piper v. Fordyce*, 119 U. S. 469; *Germania Insurance Co. v. Wisconsin*, Id. 473; *Halsted v. Buster*, Id. 341.

⁴ *Robertson v. Crease*, 97 U. S. 646; *Grace v. American Central Insurance Co.*, 109 Id. 278, 283; *Boies v. Preston*, 111 Id. 252; *Continental Life Insurance Co. v. Rhoades*, 119 Id. 237; *King Bridge Co. v. Otoe County*, 120 Id. 225. "That the point as to jurisdiction is not made by either party is immaterial, because, as was said in *Mansfield v. Railway Co. v. Swan*, 111 U. S. 379, 382, the rule springing from the nature and

of a State court by the Supreme Court of the United States, it must consequently appear not only that a federal question may have been decided adversely to the United States, but that such was actually the case. The object of the grant of appellate jurisdiction is not to correct the errors of the State courts in the administration of the local law, or the general principles of jurisprudence, but to ascertain whether their judgments conflict with the rules laid down in the Constitution or by Congress. When, therefore, the plaintiff in the court below claims a right, privilege, or exemption, under the Constitution, and judgment is rendered for the defendant on other grounds, the Supreme Court will not inquire into their sufficiency, except so far as may be necessary to show that they are real, and were not resorted to for the purpose of evading the rule relied on by the plaintiff.¹

It is at the same time established that the circuit courts of the United States are not inferior in the technical sense of the term, and while their proceedings may be reversed if

limits of the judicial power of the United States is inflexible and without exception, which requires the court of its own motion to deny its own jurisdiction, and the exercise of its appellate power, and that of the other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then the court from which the record comes." *King Bridge Co. v. Ottoe County*, 120 U. S. 225. See also *Hancock v. Holbrook*, 112 Id. 229, 231.

¹ *Brooks v. Missouri*, 124 U. S. 394, 400; *Murdock v. Memphis*, 20 Wallace, 590; *Choteau v. Gibson*, 111 U. S. 200; *Chapman v. Goodnow*, 123 Id. 510, 518; *Brooks v. Missouri*, 124 Id. 394; *Miller v. Brown*, 16 Peters, 525; *Lawlor v. Walker*, 14 Howard, 152; *Railroad Co. v. Rock*, 4 Wallace, 177. The conflict of a State law with the Constitution of the United States, and a decision by a State court in favor of its validity, must appear on the face of the record before it can be re-examined in this court; and it must appear in the pleadings of the suit, or from the evidence in the course of trial, in the instructions asked for, or from exceptions taken from the ruling of the court. It must be that such a question was necessarily involved in the decision, and that the State court would not have given judgment without deciding it. *Lawler v. Walker*, 14 Howard, 152.

jurisdiction does not appear affirmatively, they cannot be impeached collaterally, or treated as void, unless the cause is so entirely foreign to the powers of the court as to be necessarily beyond its cognizance.¹ To render a judgment of a district or circuit court of the United States a nullity while still standing and unreversed, there must consequently be a plain want of authority, as distinguishable from its erroneous exercise, or the failure of the record to show that the conditions as to citizenship were fulfilled.² In *McCormick v. Sulivant*,³ a decree in a former suit was pleaded in bar of the action. To this a replication was filed, alleging that the proceedings in the former suit were *coram non judice*, the record not showing that the complainants and defendants in that suit were citizens of different States; but the Supreme Court held on appeal that the courts of the United States are of limited, but not of inferior jurisdiction. If the jurisdiction be not alleged in the proceedings, their judgment and decrees may be reversed; but until reversed, they are conclusive between the parties and their privies. They are not nullities.⁴

It follows that if a cause is brought by a writ of error, or on appeal, before the Supreme Court, and affirmed on the merits, the decision will be final and conclusive, although the case was not originally — from its nature or the character of the parties — within the grant of judicial power to the United States, because there is no longer any tribunal that can note the defect.⁵

On the other hand, a judgment which manifestly exceeds or lies without the power of the court is null, and may be shown to be so in the course of any subsequent or collateral proceeding.⁶ This rule applies to the decision of all courts,

¹ *Grignon Lessee v. Astor*, 2 Howard, 319.

² *Des Moines Navigation Co. v. Iowa Homestead Co.*, 123 U. S. 552.

³ 10 Wheaton, 192.

⁴ *Des Moines Navigation Co. v. Iowa Homestead Co.*, 123 U. S. 552, 557.

⁵ *Des Moines Navigation Co. v. Iowa Homestead Co.*, 123 U. S. 552.

⁶ *Elliott v. Piersol*, 1 Peters, 328, 340; *Thompson v. Whitman*, 18

whether of inferior or superior jurisdiction, because no authority which is derived from the law can transcend the source from whence it came.¹ A criminal information in the Court of Common Pleas, or a common recovery, or writ of right in the King's Bench, would have been simply void as between the parties to the cause, and could not be pleaded in justification for acts done under them by the officers of the court.² This appears from the leading case of the Marshalsea,³ where it is said that "when the court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process, and therefore the said rule cited by the other side—*Qui jussu judicis aliquod fecerit* (but when he has no jurisdiction, *non est judex*) *non videtur dolo malo fecisse, quia parere necesse est*—was well allowed; but it is not of necessity to obey him who is not judge of the cause, no more than it is a mere stranger, for the rule is, *Judicium a non suo judice datum nullius est momenti*. And that fully appears in our books; and, therefore, in the case betwixt Bowser and Collins, in 22 E. IV., 33 b, there Pigot says, 'If the court has not power and authority, then their proceedings are *coram non judice*,' as if the Court of Common Pleas holds plea in an appeal of death, robbery, or any other appeal, and the defendant is attainted, it is *coram non judice, quod omnes concesserunt*.'" ⁴

*In re Sawyer*⁵ the rule was applied to a decree of the Circuit Court of the United States for the District of Nebraska. The authority of courts of equity does not extend to issuing an injunction to stay criminal proceedings, or the removal of municipal or other public officers; and the federal courts

Wallace, 457; *In re Sawyer*, 124 U. S. 202; *Gilliland v. Sellers*, 2 Ohio (N. S.), 223.

¹ *Morse v. Presby*, 5 Foster, 303; *The State v. Richard*, 6 Id. 210; *Gaston v. Badger*, 33 N. H. 228, 237.

² *Moore v. Houston*, 3 S. & R. 169, 190; *Williamson's Case*, 2 Casey, 9, 18.

³ 10 Coke, 68, 76.

⁴ 1 Smith's Lead. Cas. (8 Am. ed.) 1110.

⁵ 124 U. S. 200.

have been forbidden by Congress to enjoin proceedings in the State tribunals, except in bankruptcy. It followed that the commitment of the defendant for a contempt in refusing to obey an injunction issued on such grounds was not merely erroneous, but void, and he was entitled to be discharged on a *habeas corpus*.¹

¹ "As this court has often said: 'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.' Elliott v. Piersol, 1 Peters, 328, 340; Wilcox v. Jackson, 13 Id. 498, 511; Hickey v. Stewart, 3 Howard, 750, 762; Thompson v. Whitman, 18 Wallace, 457, 467. We do not rest our conclusion in this case in any degree upon the ground suggested in argument, that the bill does not show a matter in controversy of sufficient pecuniary value to support the jurisdiction of the Circuit Court, because an apparent defect of its jurisdiction in this respect, as in that of citizenship of parties, depending upon an inquiry into facts which might or might not support the jurisdiction, can be availed of only by appeal or writ of error, and does not render its judgment or decree a nullity. Prigg v. Adams, 2 Salk. 674; s. c. Carthew, 274; Fisher v. Bassett, 9 Leigh, 119, 131-133; Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552. Neither do we say that, in a case belonging to a class or subject which is within the jurisdiction both of courts of equity and of courts of law, a mistake of a court of equity, in deciding that in the particular matter before it there could be no full, adequate, and complete remedy at law, will render its decree absolutely void. But the ground of our conclusion is, that whether the proceedings of the city council of Lincoln for the removal of the police judge, upon charges of misappropriating moneys belonging to the city, are to be regarded as in their nature criminal, or civil, judicial, or merely administrative, they relate to a subject which the Circuit Court of the United States, sitting in equity, has no jurisdiction or power over, and can neither try and determine for itself, nor restrain by injunction the tribunals and officers of the State and city from trying and determining.

"The case cannot be distinguished in principle from that of a judgment of the Common Bench in England in a criminal prosecution, which was *coram non judice*; or the case of a sentence passed by the Circuit Court of the United States upon a charge of an infamous crime, without a presentment or indictment by a grand jury. Case of the Marshalsea, 10 Rep. 68, 76; *Ex parte* Wilson, 114 U. S. 417; *Ex parte* Bain, 121 Id. 1. The Circuit Court being without jurisdiction to entertain the bill

in equity for an injunction, all its proceedings in the exercise of the jurisdiction which it assumed are null and void. The restraining order, in the nature of an injunction, it had no power to make. The adjudication that the defendants were guilty of a contempt in disregarding that order is equally void; their detention by the marshal under that adjudication is without authority of law, and they are entitled to be discharged." *Ex parte Rowland*, 104 U. S. 604; *Ex parte Fisk*, 113 Id. 713; *In re Ayers*, 123 Id. 443, 507; *In re Sawyer*, 124 Id. 200, 222.

LECTURE XLVIII.

Suits against a State. — Appellate Jurisdiction of the Supreme Court of the United States. — A Writ of Error to a State court is not a suit against the State, even when she is the plaintiff below and defendant in error. — Cases arising under the Constitution and Laws of the United States are within the Grant of Judicial Power, although the fund or property in dispute is held for or claimed by a State, unless Redress cannot be given without proceeding to Judgment and Execution against the State. — Pennsylvania and Virginia Resolutions, as to the Organization and Powers of the Supreme Court of the United States.

As the Constitution originally stood, suits against a State were, equally with those in which the State was a plaintiff, within the meaning of the Constitution. The point arose, and was decided at a comparatively early period, in *Chisholm v. The State of Georgia*.¹ This judgment was viewed with jealousy, as sanctioning a means by which a State might be burdened with debts without the consent of her citizens. By the Eleventh Amendment, passed not long afterward, it was provided that the judicial power of the United States "shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." This prohibition, however, applies only where the State is a party of record, or so directly interested in the result that the suit cannot justly be decided without making her a party,² and does not include suits brought against an individual for money or assets of any other description, in his hands or received by him under

¹ 2 Dallas, 419.

² *Cunningham v. The Macon & Brunswick R. R. Co.*, 109 U. S. 446.

such circumstances as to make him a debtor to the plaintiff, although the fund in controversy is claimed by the State, and results from the execution of a law which she has enacted;¹ nor is it applicable to an appeal or writ of error from a judgment rendered in favor of a State tribunal.² For like reasons a suit in the courts of the United States against a bank, or other corporation created by a State, is not a suit against the State in the sense of the Eleventh Amendment, even when the State is a stockholder, and the assets are exclusively hers. So an action may well be maintained in a federal court against a municipal or other agency created by a State for the local government of a town or district.

The Constitution confers jurisdiction in all cases arising under the laws and Constitution of the United States; which, taken literally, would authorize a suit against a State wherever such a question is involved. What the Eleventh Amendment provides is that a State shall not be sued by the "citizens of another State, or by citizens or subjects of any foreign State." Whether the federal courts could take cognizance of controversies between a State and her citizens, involving a clause of the Constitution or an act of Congress, remained an open question;³ and it was also contended that where judgment was rendered for a State in a suit instituted by her against a citizen, and the latter brought the cause by a writ of error before the Supreme Court of the United States, he became plaintiff and the State defendant, and the case fell under the Eleventh Amendment.

The controversy was complicated by a pretension which struck at the root of the appellate jurisdiction of the United States. Had it succeeded, a forensic anarchy would have ensued; the Supreme Court would have been disabled in the performance of its functions; and the State courts, left to

¹ *Osborn v. Bank of the United States*, 9 Wheaton, 738.

² *Martin v. Hunter's Lessee*, 1 Wheaton, 304; *Cohen v. Virginia*, 6 Id. 264; *Strauder v. West Virginia*, 100 U. S. 303; *Virginia v. Rives*, Id. 313; *Poindexter v. Greenhow*, 114 Id. 270.

³ See the arguments of counsel in *Osborn v. Bank of the United States*, 9 Wheaton, 738, 762, 798; *Marye v. Parsons*, 114 U. S. 325, 337.

themselves and having no common head, must have clashed with each other and with the judgments of the federal tribunals. The grant of appellate power does not prescribe the manner of its exercise, nor whether it shall be universal or confined to the judgments of the subordinate courts of the United States; and it was argued that there could be no implied right on the part of the tribunals of one government to reconsider the judgments rendered by the judges of another, which was also sovereign and, in many respects, co-ordinate. There was no express authority for such an assumption of power by the Supreme Court of the United States, and it must consequently be regarded as a usurpation.

The question arose in *Martin v. Hunter*,¹ out of a peremptory refusal by the Virginia court of last resort to recognize the authority of the Supreme Court of the United States as an appellate tribunal, in language which reflected the tone of the Kentucky Resolutions of 1797, and was a natural outgrowth of their principles. It was as follows: —

“The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States; that so much of the twenty-fifth section of the act of Congress to establish the judicial courts of the United States as extends the appellate jurisdiction of the Supreme Court to this court is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court.”

The jurisdiction of the Supreme Court of the United States was vindicated by Story, J., in an opinion remarkable for its breadth and moderation, and to this effect: —

On turning to the Constitution it would be seen that judicial power was given generally and without restriction in all cases in law or equity under the Constitution, the laws of the United

¹ 1 Wheaton, 304.

States, and treaties made or to be made under their authority. And the Constitution also declared that in all cases affecting ambassadors, or other public ministers, and consuls, and those in which a State was a party, the Supreme Court should have original jurisdiction. In all the other cases before mentioned the Supreme Court was to have appellate jurisdiction, both as to law and fact, — with such exceptions and under such regulations as should be made by Congress. This language was imperative, and could only be construed as an absolute grant of judicial power over all the subjects enumerated in the Constitution. The mode in which that power should be exercised might be determined by Congress. It might, subject to the restrictions imposed by the Constitution, be made original or appellate; but in one form or other it was the duty of Congress legislatively to confer jurisdiction on the federal tribunals. It had been contended in argument that the meaning of the Constitution might be satisfied by giving the court an appellate jurisdiction over cases arising in the inferior courts of the United States. But this was not the language of the Constitution. The words were, “all cases arising under the Constitution, the laws, and the treaties of the United States;” and they obviously included cases so arising in the State courts as well as those brought in the courts of the United States. If, for instance, a contract for the payment of money was made between citizens of the same State and a suit brought upon it in the courts of the State, the court would have exclusive jurisdiction in the first instance of the suit. The defendant might, however, rely at the trial on a State law making paper money a legal tender, or impairing the obligation of a contract on which the suit was brought. Such a law would obviously be contrary to the Constitution of the United States. Still, this would not of itself, nor unless provision were made by Congress for the immediate removal of the suit, put an end to the jurisdiction of the court. It would still be its duty to consider and determine the validity of the defence. A case would consequently arise under these circumstances which was at once within the jurisdiction of the State court, and under the Constitution of the United States. Could it be doubted that the appellate power of the Supreme Court extended to such a case? If it did not an exception would be created contrary to the terms of the grant, which were absolute, and the meaning of the Constitution, which was that the Supreme Court should correct every judicial violation of

the Constitution. It was not denied that when a case arose in a State court involving the Constitution, the laws, or the treaties of the United States, it might be removed to the courts of the United States if a provision was made to that effect by Congress. A power to remove a case before judgment necessarily implied a right to remove it afterwards. In either case the jurisdiction must be exercised by a writ directed to the court in which the suit originated, commanding it to stay proceedings and submit the cause to the consideration of another tribunal. Of the two methods it might seem more consistent with the due administration of justice to wait until the State court had decided, and then reconsider their determination if contrary to the Constitution or laws of the United States, and this method had been adopted by Congress. It followed that "the judgment of the Court of Appeals of Virginia on the mandate of this court must be reversed, and the judgment of the District Court of Virginia held at Winchester be and the same is hereby affirmed."

Whether the Virginia court was convinced by Story's able argument cannot be known with certainty, because judgment was entered in the court above under the twenty-fifth section of the Judiciary Act of 1879, providing that when the cause had been remanded, and was again heard on an appeal or writ of error, the Supreme Court might enter a final judgment and award execution. This law was revised in 1867, and the Supreme Court may now proceed forthwith to execution without sending the record down to the court below and requiring it to enforce the decree.

Here the controversy might have ended; but it was renewed in *Cohen v. Virginia*,¹ under circumstances covering the entire field, including the right to issue a writ of error at the instance of the defendant in a cause where the State is plaintiff, and the proceeding may consequently be regarded as against her in the sense of the Eleventh Amendment.

In *Cohen v. Virginia*² the validity of a fine imposed on the plaintiff in error, for vending lottery-tickets under an authority claimed under a license from the United States, but contrary to the laws of Virginia, came on appeal before the

¹ 6 Wheaton, 254.

² 6 Wheaton, 254.

Supreme Court of the United States. It was contended on behalf of the Commonwealth of Virginia, which was the defendant in error, that in construing the grant of judicial power in all cases arising under the Constitution and laws of the United States, cases must be distinguished from questions. The cases contemplated by the Constitution were cases arising so directly under the Constitution and laws of the Union that they might be brought in the first instance in the federal tribunals. The mere fact that a question involving the Constitution might or did arise in a suit brought in a State court would not render the suit a case under the Constitution or laws of the United States. It was a familiar principle that to authorize the hearing and determination of any cause the parties as well as the subject-matter must be within the jurisdiction of the court. The Eleventh Amendment to the Constitution declared that the judicial power of the United States "shall not extend" to a suit against a State by the citizens of another State, or the citizens or subjects of a foreign nation; and it was an inevitable inference that a State could not be sued in the federal courts by her own citizens. In the case under consideration one of the parties was the State of Virginia, the other a citizen of that State; and the mere circumstance that a law of Congress was involved did not give the Supreme Court jurisdiction, or authorize it to cite the State of Virginia to appear and show cause why the judgment which had been rendered by her tribunals should not be reversed.

The judgment was delivered by Chief-Justice Marshall, and substantially as follows:—

Three points had been made in support of the motion to dismiss the writ for want of jurisdiction: first, that the defendant in error was a State; secondly, that no writ of error lay from the Supreme Court to a State court; and finally, that the court had no jurisdiction of the cause by virtue of the Constitution or the Judiciary Act of 1789. The propositions advanced by the defendant in error under these heads were of great magnitude and might be said vitally to affect the Union. They excluded the inquiry whether the Con-

stitution and laws of the United States had been violated, and maintained that if such a violation had occurred it was not in the power of the Government to apply a corrective. They maintained that the nation did not possess a department capable of restraining peaceably by authority of law the attempts which might be made by a part against the authority of the whole, and was reduced to the alternative of enduring such encroachments or resisting them with arms. They maintained that the Constitution of the United States had provided no tribunal for the final construction of the Constitution, the laws, or the treaties of the nation, but that this power might be exercised in the last resort by the courts of every State in the Union; that the Constitution, laws, and treaties might receive as many constructions as there were States; and that this was not a mischief, or if a mischief, was irremediable. If such was the Constitution it was the duty of the court to defer respectfully to its provisions. If such was not the Constitution, it was equally the duty of the court to say so, and to perform the task assigned to it by the people.

The first question to be considered was whether the jurisdiction of the court was excluded by the character of the parties, — one being a State, and the other a citizen of that State. By the Third Article of the Constitution, section second, jurisdiction was given to the courts of the Union in two classes of cases. In the first, jurisdiction depended on the character of the cause, whoever might be the parties. This class comprehended “all cases in law or equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority.” The clause extended the jurisdiction of the court to all the cases described, without making any exception, and without any regard to the condition of the party. If any exception existed it must arise by implication, against the express words of the clause. In the second class the jurisdiction depended altogether on the character of the parties. In it were comprehended controversies between two or more States, between a State and citizens of another State, and between a State and a foreign State, its citizens or subjects. If such were the parties, it was entirely unimportant what might be the subject of controversy. Be it what might, such parties had a Constitutional right to come into the courts of the Union.

The jurisdiction of the court being thus extended by the letter of the Constitution to all cases arising under it or under the laws of

the United States, they who would withdraw any case of this description from that jurisdiction must base the exemption on the spirit and true meaning of the Constitution; which spirit and true meaning must be so apparent as to overrule the words of the instrument. The counsel for the defendant in error had undertaken to do this on two grounds: first, that a sovereign independent State was not suable except by its own consent; and next, that the courts of the United States could not, by the true construction of the Constitution and the Judiciary Act, exercise an appellate jurisdiction over the courts of a State. The general proposition that consent was necessary to jurisdiction over a State would not be controverted; but its consent need not be given in each particular case, — it might be granted generally, once for all. If a State surrendered any portion of its sovereignty the question whether a liability to suit was a part of that portion depended upon the instrument by which the surrender was made. If, upon a just construction, it appeared that the State had submitted to be sued, then the sovereign right of deciding in every case upon the justice of its own cause was no longer in the State, and might be exercised by the tribunal before which the suit was to be brought.

It had been said that cases in which a State might be made a party were enumerated in the Constitution, and did not include a suit brought by a State against her own citizens, or by a citizen of the State against the State; and that it was expressly declared by the Eleventh Amendment that the Constitution should not be so construed as to authorize a suit by an individual against a State. This argument might be conclusive if the object was to prove that the character of the parties in the case under consideration was not such as to confer jurisdiction. It went no part of the way towards establishing that the character of the parties was such as to defeat the jurisdiction which the court possessed under the general authority to take cognizance of all cases arising in law or equity under the Constitution. It was not necessary to inquire whether a citizen could by virtue of this grant proceed against his State. The case before the court was a prosecution instituted by a State for an act done by one of her citizens under an authority derived from the United States. The case was not varied by the Eleventh Amendment, which was confined to instances where a demand against a State was made by an individual in the courts of the Union. It spoke of suits at law or in equity prosecuted against a

State by a citizen of another State or of a foreign nation. No such suit could be brought or maintained consistently with the Amendment; but a suit by a State against a citizen was obviously not within the words or spirit of this provision when first instituted, and would not come within it because a writ of error was subsequently sued out in which the original plaintiff appeared as defendant and the original defendant as plaintiff. Notwithstanding the seeming change, the cause and the actors would still be the same, and the writ of error a means of rendering the defence effectual. Besides, a writ of error was not directed to the parties, but to the court; it was not, even when a State was a party, a demand against the State. The motive for issuing it was merely to remove the cause from the court and bring it for consideration before another tribunal. It was said that every such writ contained a citation which made the State a party defendant. But what was the citation? It was simply a notice to the party who had obtained judgment in the court below that the record was transferred into another court, where he might appear or decline to appear according to his judgment or inclination. It was not therefore a suit, nor had it the effect of process. This would be seen on reference to the practice in suits instituted by the United States. It was well established that no suit could be commenced or prosecuted against the United States. Yet writs of error accompanied with citations had uniformly issued for the removal of judgments in favor of the United States into a superior court where they might, like those in favor of an individual, be re-examined and affirmed or reversed.

It was therefore the opinion of the court that a defendant who removed a judgment rendered against him in favor of a State into the Supreme Court for the purpose of re-examining the question whether the judgment was in violation of the Constitution and laws of the United States did not commence or prosecute a suit against the State. But if the court was mistaken in this opinion the error would not affect the case actually before them. For if the writ of error was a suit in the sense of the Eleventh Amendment, it was a suit commenced and prosecuted by a citizen of the State and not by a citizen of another State or of a foreign nation. It was not therefore within the Amendment, but was governed by the Constitution as originally framed, which gave judicial power in all cases arising under the Constitution and laws of the United States without respect to parties.

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The second objection to the jurisdiction of the court was that its appellate power could not be exercised in any case over the judgment of a State court. This objection was sustained chiefly by arguments drawn from the supposed total separation of the judiciary of the States from that of the Union. It was said that the federal judiciary was completely foreign to that of a State, and that there was no other or greater connection between them than between the courts of two independent nations. This hypothesis was not founded on the words of the Constitution, — which conferred appellate jurisdiction on the Supreme Court in general terms, — but, on the assumption that the application of this jurisdiction to the judgments of the State courts would be so repugnant to reason and incompatible with principle as to show that the right of appeal should be confined to cases arising in the inferior courts of the United States. Did such an unreasonableness, such an incompatibility exist? The contrary was apparent. That the United States formed for many and for some most important purposes a single nation could not be denied. In war they were one people. In making peace they were one people. In all commercial regulations they were one and the same people. In many other respects the American people were one; and the only government which was capable of controlling and managing their interests in all these respects was the Government of the Union. It was their government; and in that character they had no other. America had chosen to be in many respects and to many purposes a nation; and for all these purposes her government was complete, to all these objects it was competent. The people had declared that in all powers given for these objects it was supreme. It could therefore for these ends legitimately control all individuals and governments within the American territory. The Constitution and laws of a State, so far as they were repugnant to the Constitution and laws of the United States, were absolutely void. The States were constituent parts of the United States. They were members of one great empire, and if sovereign for some purposes were subordinate for others.

Was it unreasonable that in a government so constituted the judicial department should be competent to give efficacy to the constitutional authority of the legislature? — that it should have authority to decide on the validity of the Constitution or law of a State, if it was repugnant to the Constitution or laws of the United States? Was it unreasonable that it should also be empowered to

declare the judgment of a State tribunal unconstitutional in enforcing such a law? Was it so very unreasonable as to furnish a justification for controlling the words of the Constitution? It would be obvious, on examination, that it was not; and that the incongruity was, on the contrary, in the hypothesis maintained by the defendants in error. If the federal and State courts had concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States, and if a case of this description could neither be removed before judgment nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States would devolve equally on the judiciary of the United States and the State courts, however they might be constituted.

It had been remarked by a very able statesman that thirteen independent courts (and the number was already increased to twenty) of final jurisdiction over the same causes arising upon the same laws would be a judicial hydra from which nothing but confusion and contradiction could proceed. This evil could not be prevented, or the uniform exposition of the Constitution and laws of the United States which was obviously requisite attained, without vesting in some single tribunal the power of deciding in the last resort all cases in which they were involved. There was consequently nothing in the political relations between the general and State governments to warrant a restrictive construction of the words by which appellate jurisdiction was given to the Supreme Court in all cases arising under the Constitution, laws, or treaties of the United States, and much to show that they should be taken in the general sense which was their natural import. Such was the cotemporaneous exposition as given in the "Federalist," and it had been acted on in numerous instances from the foundation of the government.

Another argument used by the defendants in error should perhaps be noticed. It had been said that the interpretation of the Constitution and laws of the United States might safely be left to the legislature and courts of the States, unless there was a disposition so hostile to the existing political system as to engender a resolution to destroy it, and that should such a resolve be formed it could not be restrained by parchment stipulations. The fate of the Constitution would not then depend upon judicial decisions. Without an appeal to force the States could put an end to the government by mere inaction. They had only to refrain from electing senators,

and in an essential part, on which all else depended, it would be rendered impotent. It was no doubt true, as this argument alleged, that if ever hostility to the government of the United States became universal it would also be irresistible. The people made the Constitution, and they could unmake it. It was the creature of their will, and lived only by it. But this supreme and irresistible power to make and unmake resided only in the whole body of the people, not in any subdivision.

The acknowledged inability of the government to sustain itself against the public will, and to control the whole nation by force or otherwise, was therefore no sound argument for a constitutional inability to protect itself against a section of the nation acting in opposition to the general will.

It might be conceded that if all the States, or a majority of them, refused to elect senators, the legislative powers of the Union would be suspended; but if any one State refused to elect them, the Senate would not on that account be the less capable of performing all its functions. The argument therefore rather went to prove the subordination of the parts to the whole than the complete independence of any one of the parts. The framers of the Constitution were indeed unable to make any provisions which should protect that instrument against a general combination of the States, or of the people, for its destruction; and conscious of their inability did not make the attempt. But they were able to provide against the operation of measures adopted in any one State, and tending to arrest the execution of the laws which had been enacted by all; and thus much it was the part of true wisdom to attempt. The language of the Constitution showed that the attempt had been made, and means devised to render it effectual.

The history of the case would be incomplete without adding that while the judicial right to revise the decisions of the State courts was firmly vindicated, the court also held that a grant by Congress to the mayor and corporation of Washington of the power to raise money by a lottery did not authorize a sale of tickets beyond the limits of the District of Columbia, and within the boundaries of a State where lotteries were forbidden by law.¹ The fine imposed by the Quarter Sessions on Cohen was consequently affirmed.

¹ See *post*, 1143.

It results from the foregoing judgment that a suit or prosecution instituted by a State against a citizen thereof, or a citizen of another State, may be removed by a writ of error into the Supreme Court, if any question arises in the course of the proceedings under the Constitution or laws of the United States, and is determined adversely to the defendant. Under these circumstances the State is still the actor or plaintiff, and the writ of error merely a means of rendering the defence available.

The argument of Chief-Justice Marshall, in *Cohen v. Virginia*, that what had been done by all might be undone if all concurred, but that an attempt by any part to resist the authority of the whole would be a usurpation which should be met and repelled by the government, — which alone represented the American people as a collective whole, — was a victorious answer to the contention of Mr. Barbour, for the defendants, that a State could not be constrained contrary to her inclination. The question which received a judicial determination in this instance was identical with that which the ordinances of secession put at issue, to be determined by an appeal to arms. If the application of the laws of a State belonged in the last resort to the State tribunals, and their judgment were final, it would be binding on the citizen, and a legal justification for any act done under the authority of the State in opposition to the National Government. If, on the other hand, the courts of the United States have a right to revise and correct the judgments of the State courts in cases involving the statute or organic law of the Union, there is a paramount authority which must be obeyed, anything in the Constitution or laws of the State to the contrary notwithstanding.¹

¹ The political heresy which Marshall so ably refuted in *Cohen v. Virginia*, reappeared in *The Bank v. Knoup*, 6 Ohio, n. s. 342, where Bartley, Ch.-J., contended that the State and the federal courts stand on the same level, neither having a right to supervise the other, and that whichever first obtains jurisdiction may proceed to a final and conclusive judgment. In his opinion, the appellate power of the Supreme Court of the United States was limited to appeals from the subordinate federal

courts, and could not be exercised over the State tribunals. This opinion was overruled by the majority of the judges, who held that the authority of the national judiciary is paramount.

The stand taken by the Virginia Court of Appeals in *Martin v. Hunter* is the more singular, because Virginia had recently vindicated the true method of the Constitution against an innovation attempted by Pennsylvania. In the year 1809 the legislature of the latter State proposed an amendment to the Constitution of the United States, providing for the appointment of an impartial tribunal to decide between the State and the federal judiciary, which was transmitted by the Governor to the legislature of Virginia. The latter body referred the subject to a committee, which, on the 18th of January, 1810, reported as follows:—

“That they had taken the subject into consideration, and were of opinion that a tribunal was already provided by the Constitution—to wit, the Supreme Court—more eminently qualified from their habits and duties, from the mode of their selection, and from the tenure of their offices, to decide disputes in an enlightened and impartial manner than any other tribunal which could be created. The members of that court were selected from the citizens of the United States who were most celebrated for their virtue and legal learning, not at the will of a single individual, but by the concurrent choice of the President and Senate. They would, therefore, presumably be free from local prejudices and partialities. The proposed amendment seemed to be founded upon the idea that the federal judiciary would, from a lust of power, enlarge their jurisdiction to the annihilation of the jurisdiction of the State courts; that they would substitute their will for the law or the Constitution. Such a danger was not to be anticipated from any court; but if there were sufficient grounds for the apprehension, what security could be given for the course of the new tribunal proposed by the State of Pennsylvania?

“Such a court would, so far as any idea of it could be drawn from the description given in the resolution transmitted by the legislature of that State, tend rather to invite than avert a collision between the federal and State courts. It might also become, in process of time, a serious and dangerous embarrassment to the operations of the General Government.”

The report was unanimously adopted, and resolutions passed in accordance with it transmitted “to each of the senators and representatives of Virginia in the Congress, and to the executives of the several States in the Union, with a request that the same should be laid before the legislatures thereof.” See Webster’s Works, vol. iii. p. 352.

LECTURE XLIX.

The States exempt from Suit wherever they have not irrevocably waived the Privilege. — Object and Effect of the Eleventh Amendment. — A Recovery may be had in Damages or specifically against the Officers or Agents of a State for things wrongfully Taken by them on her behalf, although she is Interested, and cannot be Served with Process. — A State Treasurer will not be decreed to refund Money which has been illegally Extorted and paid into the Treasury, although he may be made personally Answerable in Damages. — A plain ministerial Duty may be Enforced by a *mandamus*. — A *mandamus* will not be issued to Compel the Exercise of a Discretionary Power. — A State cannot be Compelled specifically to perform a Contract by a Suit against its Officers. — Are Taxation and the Selection of Jurors simply Ministerial? — A Bill in Equity cannot be filed against the Officers of a State where she is directly interested; but the Rule does not apply when her Interest grows out of a Command which she is constitutionally Powerless to Give. — The object of the Eleventh Amendment was to guard the States against Suits for Debts and on Contracts, and not to enable them to despoil the Citizen and rely on their Sovereignty as a Defence.

It is now settled that the sovereignty of the States, as recognized or reinstated by the Eleventh Amendment, places them beyond the reach of process where they have not given their consent; and that such consent cannot be implied from the general grant of jurisdiction in all cases arising under the Constitution and laws of the United States. An action *ex contractu* cannot, therefore, be maintained against a State to compel the fulfilment of an obligation to which her faith is pledged, and which she is impairing, contrary to the spirit and letter of the clause which protects the sanctity of contracts; nor can she judicially be compelled to make compensation for a tort committed at her command, however gross.¹

¹ *Cunningham v. M. & B. R. R. Co.*, 109 U. S. 446; *Carter v. Greenhow*, 114 Id. 317; *Marye v. Parsons*, Id. 325, *Georgia v. Jessup*, 106 Id. 458.

Agreeably to the view taken in the minority opinion in the *Virginia*

It is immaterial that the State gave its consent to be sued at the time of making the contract, or giving the guarantee, unless the act also provides the means of carrying the judgment into effect, and they can be employed without exercising a political function in the shape of making appropriations, or levying and collecting taxes, which forms no part of its judicial power. A contract, as we have seen, is an undertaking that can be enforced by process; and where, if the courts were to declare the contract binding they would be powerless to enforce the decree, there is no obligation in the sense of the Constitutional prohibition, and consequently nothing on which it can operate.¹

Coupon Cases, if the Eleventh Amendment does not forbid the exercise of the judicial power of the United States in suits prosecuted against a State by her own citizens, the reason is that it was not deemed necessary to prohibit what had not been authorized. "The control of such litigation was impliedly reserved to the States; and it cannot have been intended that, while the State cannot be sued in any case by a citizen of another State since the adoption of the Amendment, such a suit may be instituted by her own citizens under the Constitution and laws of the United States." *Marye v. Parsons*, 114 U. S. 325. The inference is no doubt sound, but it does not take the case out of the rule that a recovery may be had against a tort-feasor, although he acted at the command of a superior who is not joined. See *Osborn v. The Bank of the United States*, 9 Wheaton, 748, 843.

¹ See *ante*, 577; *The Railroad Co. v. Tennessee*, 101 U. S. 339; *Hagood v. Southern*, 117 Id. 57.

"The question we have to decide is not whether the State is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty. It is conceded that when this suit was begun the State had withdrawn its consent to be sued, and the only question now to be determined is whether that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce. If it did it was inoperative, so far as this suit is concerned, and the original consent remains in full force for all the purposes of the particular contract or liability here involved.

"The remedy, which is protected by the contract clause of the Constitution, is something more than the privilege of having a claim adjudicated. Mere judicial inquiry into the rights of parties is not enough. There must be the power to enforce the results of such an inquiry before there can be said to be a remedy which the Constitution deems part of a

In applying this principle it should be remembered that the grant of judicial power to the United States was an implied surrender in all cases arising under the Constitution and laws of the United States, and where a State and a citizen of another State are parties, of the right of the States to be exempt from process. But for the restraint imposed by the Eleventh Amendment the courts might render a judgment in every such instance which would be equally binding whether the defendant was a State or an individual. The question therefore depends on the operation and effect of the amendment, and there can be little doubt that its purpose simply was that the States should not be subjected against their will to pecuniary obligations which might be enforced by a *mandamus* or an injunction that would withdraw money from the treasury without the consent of the legislature, or

contract. Inquiry is one thing, remedy another. Adjudication is of no value as a remedy unless enforcement follows. It is of no practical importance that a right has been established if the right is no more available afterward than before. The Constitution preserves only such remedies as are required to enforce a contract. Here the State has consented to be sued only for the purposes of adjudication. The power of the courts ended when the judgment was rendered. In effect, all that has been done is to give persons holding claims against the State the privilege of having them audited by the courts instead of some appropriate accounting officer. When a judgment has been rendered, the liability of the State has been judicially ascertained; but there the power of the court ends. The State is at liberty to determine for itself whether to pay the judgment or not. The obligations of the contract have been finally determined, but the claimant has still only the faith and credit of the State to rely on for their fulfilment. The courts are powerless. Everything after the judgment depends on the will of the State. It is needless to say that there is no remedy to enforce a contract if performance is left to the will of him on whom the obligation to perform rests. A remedy is only wanted after entreaty is ended. Consequently, that is not a remedy, in the legal sense of the term, which can only be carried into effect by entreaty.

“It is clear, therefore, that the right to sue, which the State of Tennessee once gave its creditors, was not in legal effect a judicial remedy for the enforcement of its contracts, and that the obligations of its contracts were not impaired, within the meaning of the prohibitory clause of the Constitution of the United States, by taking away what was thus given.” *Railroad Co. v. Tennessee*, 101 U. S. 339.

hinder the operations of the government as a political and sovereign power. The words are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States, by citizens of another State or by citizens or subjects of any foreign State;" and they do not denote that an individual may take or withhold property from the lawful owner, on the plea that he is acting for a State or at her command, and thus virtually cause the deprivation which the Fourteenth Amendment prohibits. Such a conclusion would enable a State to do that circuitously which she is forbidden to effect by direct means, and confiscate land or goods arbitrarily, or render a spoliation irredeemable by adopting the act as her own.

There is consequently nothing in the Eleventh Amendment to preclude such redress as can be had in a suit against a wrong-doer, because a State is a party to the wrong; nor can such an inference be drawn from the general principles of jurisprudence. If the State is or must be joined of record under the rules of practice or pleading the suit will fail. If such a joinder be not requisite the cause may proceed to judgment as if the State were not concerned, though no writ can be issued to bind her as an organic whole.

As Chief-Justice Marshall observed in *Osborn v. The Bank of the United States*,¹ — "If the person who is the real principal, the true source of the mischief, by whose power and for whose advantage it is done be himself above the law and exempt from all judicial process, it would be subversion of the best-established principles to say that the laws cannot afford the same remedies against the agent employed in doing the wrong which they would afford against him could his principal be joined in the suit." The privilege is the principal's, not the agent's; and as it would not shield the latter if both could be joined, it is not a reason why he should not be made answerable when sued alone.² A man is not less responsible for his tortious acts, or for goods sold on his credit

¹ 9 Wheaton, 738, 842.

² See *Osborn v. The Bank of the United States*, 9 Wheaton, 738, 843.

because he represents another, and has no personal interest in the transaction; and the fact that the principal cannot be compelled to make compensation is a reason for, and not against, compelling the agent to do what justice and good faith require. Such cases fall within the general principle that justice should be done as between the parties, though third persons are concerned and may be affected by the result. The rule is well-settled at law, and it applies in equity unless the circumstances are such that the chancellor cannot proceed to a decree consistently with the equity which his jurisdiction is designed to promote. As the argument was put by the Chief-Justice in *Osborn v. The Bank*, the agent is not privileged by his connection with the principal; and if he is responsible for his own acts to the full extent of the injury, why should not the preventive power of a court of equity also be applied to him? Why may it not restrain him from the commission of a wrong which it would punish him for committing? It has accordingly been held that although the interest of a State may be incidentally involved in the decision of a cause, yet if an effectual remedy can be had without making her a defendant the federal courts may take cognizance of the suit.¹ Such is the intelligible rule laid down by Marshall, and the refinements with which it has since been perplexed can hardly be said to promote the cause of justice or of constitutional law.²

What the Amendment ordains is that a State shall not be sued. It does not ordain that the citizen shall not have justice done him because a State may be collaterally interested. A suit may consequently be maintained *in rem* although the property is claimed by a State, and judgment rendered by default unless she enters an appearance,³ or for the recovery of specific things which have been taken by persons who rely on a governmental command as a justification. The

¹ *The United States v. Peters*, 5 Cranch, 115; *Osborn v. The Bank of the United States*, 9 Wheaton, 733, 843.

² See *Cunningham v. The M. & B. R. R. Co.*, 109 U. S. 446, 463.

³ *The Davis*, 10 Wallace, 15; *Clark v. Barnard*, 108 U. S. 436; *Cunningham v. The M. & B. R. R. Co.*, 109 U. S. 446, 452.

suit is, under the last-mentioned circumstances, against an individual for conduct which is, on its face, a violation of the plaintiff's right; and he cannot make the State a party by setting up an authority from the executive or legislature which they are forbidden to confer.¹

¹ *Cunningham v. The M. & B. R. R. Co.*, 109 U. S. 446, 452; *Poin-dexter v. Greenhow*, 114 Id. 271, 288. See *ante*, pp. 683, 897.

"It is objected that the suit of the plaintiff below could not be maintained, because it is substantially an action against the State of Virginia to which it has not assented. It is said that the tax-collector who is sued was an officer and agent of the State, engaged in collecting its revenue under a valid law, and that the tax he sought to collect from the plaintiff was lawfully due; that consequently he was guilty of no personal wrong, but acted only in an official capacity, representing the State, and in refusing to receive the coupons tendered simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that if any wrong has been done it has been done by the State in refusing to perform its contract, and for that wrong the State is alone liable, but is exempted from suit by the Eleventh Article of Amendment to the Constitution of the United States, which declares that the 'judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens or subjects of any foreign State.'

"This immunity from suit secured to the States is undoubtedly a part of the Constitution of equal authority with every other, but no greater, and to be construed and applied in harmony with all the provisions of that instrument. That immunity, however, does not exempt the State from the operation of the Constitutional provision that no State shall pass any law impairing the obligation of contracts; for it has long been settled that contracts between a State and an individual are as fully protected by the Constitution as contracts between two individuals. It is true that no remedy for a breach of its contract by a State, by way of damages as compensation or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself on the part of the injured party, being a citizen of another State or a citizen or subject of a foreign State. But it is equally true that whenever, in a controversy between parties to a suit of which these courts have jurisdiction, the question arises upon the validity of a law by a State impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences to the rights of the litigants may be the result of the determination. The cases establishing these propositions which have been decided by this court since the adoption of the Eleventh Amendment to the Constitution are numerous. *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164; *Green v. Biddle*, 8 Wheat. 1, 84;

The case may nevertheless involve a question which requires a careful consideration.

An action for the recovery of property is not analogous to a suit brought to enforce a pecuniary demand. Land does *Providence Bank v. Billings*, 4 Pet. 514; *Woodruff v. Trapnall*, 10 How. 190; *Wolff v. New Orleans*, 103 U. S. 358; *Jefferson Branch Bank v. Skelly*, 1 Black, 436.

"It is also true that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record. The provision is to be substantially applied in furtherance of its intention, and not to be evaded by technical and trivial subtleties. Accordingly, it was held in *New Hampshire v. Louisiana*, 108 U. S. 76, that although the judicial power of the United States extends to controversies between two or more States, it did not embrace a suit in which, although nominally between two States, the plaintiff State had merely permitted the use of its name for the benefit of its citizens in the prosecution of their claims, for the enforcement of which they could not sue in their own names. So, on the other hand in *Cunningham v. Macon & Brunswick Railroad Co.*, 109 U. S. 446, where the State of Georgia was not nominally a party on the record, it was held that, as it clearly appeared that the State was so interested in the property that final relief could not be granted without making it a party, the court was without jurisdiction.

"In that case the general question was discussed in the light of the authorities, and the cases in which the court had taken jurisdiction when the objection had been interposed that a State was a necessary party to enable the court to grant relief were examined and classified. The second head of that classification is thus described: 'Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual; and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him.' " And in illustration of this principle, reference was made to *Mitchell v. Harmony*, 13 How. 115; *Bates v. Clark*, 95 U. S. 204; *Meigs v. McClung*, 9 Cranch, 11; *Wilcox v. Jackson*, 13 Pet. 498; *United States v. Lee*, 106 U. S. 196; *Grisar v. McDowell*, 6 Wallace, 363; *Brown v. Huger*, 21 How. 305; *Poindexter v. Greenhow*, 114 U. S. 270, 281. See *ante*, p. 683. It followed that although the property which the plaintiff sought to recover had been distrained on behalf of the State, and would if he failed be sold and the proceeds paid into the Treasury, yet as the law under which the distress took place was unconstitutional it could not be regarded as his act and did not render him a party to the suit. See *ante*, 897.

not cease to belong to the owner on being forcibly wrested from his hands; and each hour that it is detained there is a new injury, for which redress may be had through a writ of trespass or of ejectment against the parties in possession, whether they did or did not participate in the original wrong. Money, on the other hand, though taken under an illegal levy for taxes, becomes as much the property of the State on being paid into the treasury as if it had been lawfully acquired. The demand is no longer for the specific notes or coin extorted from the tax-payer, but for a like amount; and the treasurer can no more be compelled to satisfy it without an appropriation by the legislature than he could any other debt. The obligation is not his, but the State's; and as it is exempt from process, the plaintiff has no remedy except through a judgment against the original wrong-doer, which may be nugatory if he is insolvent and the government declines to refund. The line was accurately drawn in *Osborn v. the Bank of the United States*, where the bill would have been dismissed had not the \$98,000 in the hands of the defendants been specifically traced, and shown not only to be the very notes and coin which were taken from the bank, but to have been kept specifically apart to await the event of the suit. This decision, like *The United States v. Lee*,¹ and *Poindexter v. Greenhow*, is directly to the point that specific things — including chattels, lands, or coin — may be recovered from the officers or agents of a State, though taken or held in pursuance of her command, if it be one which she is constitutionally powerless to give.

A State which comes voluntarily forward as a prosecutor, plaintiff, claimant, or defendant, waives its privilege, and will be subject to the jurisdiction, not only of the court where the proceeding was instituted, but of every other into which it is duly removed by an appeal, *certiorari*, or writ of error, and will be precluded by the judgment as finally pronounced.²

¹ 106 U. S. 196.

² *The Siren*, 7 Wallace, 152, 157; *Cohens v. Virginia*, 6 Wheaton, 264; *Clark v. Barnard*, 108 U. S. 436, 447; *Cunningham v. The M. & B. R. R. Co.*, 109 Id. 446, 452; *Railroad Co. v. Mississippi*, 102 Id. 135; *Tennessee v. Davis*, 100 Id. 257. See *ante*, p. 1049.

It would be futile to enter a judgment against the State, because it could not be enforced; but judgment may be rendered for the defendant, or the judgment which has been rendered against him reversed, on a writ of error; and both parties will be as much bound by the result as if the controversy were between individuals. Cases, therefore, which contain a federal ingredient on either side may be instituted in, or removed to a circuit court, or brought by a writ of error before the national court of last resort, although a State is the plaintiff or prosecutor, and other questions are involved growing out of her laws.¹

It is also established that "when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who has sustained personal injury by such refusal may have a *mandamus* to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which adequate compensation cannot be had at law may have an injunction to prevent it. In such cases the writs of *mandamus* and injunction are correlative. In either case if the officer pleads the authority of an unconstitutional law for the performance or violation of his duty, it will not prevent the issuing of the writ."² The law was so held by Bradley, J., in *The Board of Liquidation v. McComb*, and has been repeatedly recognized or applied.³ In *The Board of Liquidation v. McComb*, the Board was charged by the statutes of Louisiana with the duty of issuing new State bonds in place of such as might be surrendered by the holders. The amount of the new bonds was limited by a constitutional provision, and McComb, the owner of some of the new bonds already issued, filed a bill

¹ *The R. R. Co. v. Mississippi*, 102 U. S. 130, 141; *Tennessee v. Davis*, 100 Id. 257; *Tennessee v. Whitworth*, 117 Id. 129.

² See *Allen v. B. & O. R. R. Co.*, 114 U. S. 315, 317.

³ *Osborn v. The Bank of the United States*, 9 Wheaton, 738; *Davis v. Gray*, 16 Wallace, 203; *United States v. Boutwell*, 17 Id. 604; *United States v. Schurz*, 102 U. S. 378; *Hartman v. Greenhow*, Id. 672; *Seibert v. Lewis*, 122 U. S. 284, 292.

to restrain the Board from issuing that class of bonds in exchange for debts not within the scope of the statute, and thus rendering those which he held less valuable. The court held that a *mandamus* or injunction will not be issued against the officers of a State where it is in effect against the State herself, or where the effect would hamper or control the discretionary power with which they have been clothed for public purposes. A State cannot be sued without its consent, nor can a court substitute its own discretion for that of a person who is charged with the performance of a political function. When, on the other hand, the path is so plainly marked out as to leave no doubt as to the line which should be followed, and a deviation from it will be at once illegal and injurious, the officers to whom the duty is intrusted may be compelled to pursue the proper course, — by a *mandamus* or injunction.¹ The injunction which had been granted by the Circuit Court to prevent the issue of the illegal bonds was consequently sustained. So in *Allen v. The Baltimore and Ohio R. R. Co.*,² an injunction was issued to prevent a distraint upon the complainant's rolling-stock and trains, for the collection of taxes that had been tendered in coupons which the State had agreed to receive as cash, but subsequently repudiated.

In *Rolston v. The State of Missouri Fund Commissioners*,³ a suit to constrain State officers to perform an act which a statute of the State enjoins was said on like grounds not to be a suit against the State or within the Eleventh Amendment. The proceeding was instituted to restrain the Commissioners of the State of Missouri from selling a railroad which was held by the plaintiffs as trustees for the stock-

¹ See *Riggs v. Johnson County*, 6 Wallace, 166; *Amy v. Supervisors*, 11 Id. 136; *Marbury v. Madison*, 1 Cranch, 137. It was held in this instance that the delivery of a commission which had been signed by the President but was withheld by his successor in office, was a purely ministerial act which the Supreme Court would have enforced by a *mandamus* to the Secretary of State, were not their original jurisdiction confined to "suits affecting ambassadors, public ministers, and consuls, and where a State is a party."

² 114 U. S. 311.

³ 120 U. S. 390.

holders and creditors; and the main object was to require the governor to assign and convey to the trustees all the first liens and mortgages on the road on the payment of the amount due. The court held that the case was distinguishable from *Louisiana v. Jumel*,¹ on the ground that the effort there was to get a State officer to do what a statute required of him, and not to compel a State officer to do what a statute prohibited him from doing. The law there made it the Governor's duty to assign the liens in question to the trustees on their making a certain payment. The trustees claimed that the money had been paid; the officer said that it was not; and there was no controversy about his duty if the payment had taken place. This presented a simple question of fact; and if it was decided in favor of the complainants they were entitled to a decree.

In *Davis v. Gray*² the principle was applied in a somewhat different form, by enjoining the Governor of Texas and the Commissioner of the State Land Office from selling and delivering patents for sections of land which the State had agreed to bestow on a railway company. The complainants had acted on the faith of the agreement by surveying and locating the road; the land was equitably, if not legally, theirs; and the defendants could not dispose of it to third persons by virtue of an authority which the State could not confer consistently with the obligation into which she had entered, and was forbidden by the Constitution to impair.

It has also been held that an act done by a State officer, in his public capacity, which deprives any person of life, liberty, or property, or operates as a denial of the equal protection of the laws, may, if Congress so provide, be made the subject of an indictment, and punished as a misdemeanor.³ The greater includes the less; and if the rod of a criminal prosecution can be held over the persons who administer the State governments, whenever they transcend

¹ 107 U. S. 711.

² 16 Wallace, 203.

³ See *ante*, pp. 524, 538; *Ex parte Virginia*, 100 U. S. 339; *Civil Rights Cases*, 109 Id. 3, 15.

the limits set by the organic law, they may, as it would seem, be kept within bounds by the milder application of an injunction or *mandamus*.¹

These decisions mark the utmost point to which the courts have gone in giving a judgment, or issuing process, that will directly affect a State; and they cannot proceed further, consistently with the Eleventh Amendment, no matter how gross the tort or breach of contract, and although their inaction leaves it irremediable. A purely ministerial duty may be judicially enforced, regardless of the rank of the functionary to whom it is intrusted; but a judge cannot control a public officer in the exercise of a power which is in any degree discretionary, or confine him — when two paths lie open, and it is for him, or for the State, to decide which shall be pursued — to a particular line of conduct, without assuming the reins of government, and, so far as the order extends, superseding the legislature or executive.²

A State treasurer, who comes into possession of the money of the citizen under circumstances constituting the deprivation which the Amendments forbid, may be personally liable for the amount, or, if the money can be identified or ear-marked, ordered to refund it specifically;³ but he cannot be compelled to make the loss good out of the funds in the treasury, although the money was deposited to the credit of the State, and went to swell the balance in her favor.⁴ So a collector may be enjoined from enforcing an illegal tax, or one which the State agreed to forego,⁵ because the law in either case is one which, in legal contemplation, she is powerless to make, and the collector is proceeding in his own wrong.⁶ For like reasons, while a municipal corporation may be compelled by *mandamus* to levy a tax as a means of paying its loans or

¹ See *Ex parte Virginia*, 100 U. S. 339.

² *Louisiana v. Jumel*, 107 U. S. 711. See *ante*, pp. 129, 131; *Marbury v. Madison*, 1 Cranch, 137.

³ *Osborn v. The Bank of the United States*, 9 Wheaton, 738.

⁴ See *Poindexter v. Greenhow*, 114 U. S. 269; *Louisiana v. Jumel*, 107 Id. 711, 724.

⁵ See *ante*, pp. 687, 724.

⁶ See *ante*, 669, 709.

bonds, notwithstanding any law which may be made to the contrary, short of a dissolution of the corporation, — and a like pressure may be put for the same end on the judges of a county court,¹ — no such constraint can be put on a State, either directly or through its officers. An act providing that a tax shall be levied and the proceeds appropriated to the payment of a specific loan or demand cannot, as we may infer, be enforced through a *mandamus* to the State treasurer or assessors, although the creditors parted with their money on the faith of the assurance thus held forth, and the duty is so plainly defined as to involve no element of discretion except, it may be, as regards the assessment of the tax.²

In *Louisiana v. Jumel* the suit grew out of the contract which gave rise to the controversy in *The Board of Liquidation v. McComb*. The owners of the bonds which had been issued in that case filed a bill in equity in the Circuit Court of the United States to compel the State Auditor and Treasurer to pay the overdue coupons out of the public funds in the treasury, and enjoin them from applying any part of the taxes levied for that purpose to the ordinary expenses of the government. They also asked for a *mandamus* to compel the same officers to apply the amount collected on such taxes to the discharge of the coupons. Both applications were refused on the ground that the Circuit Court had no jurisdiction over the State treasury, and was not entitled to control it indirectly through a proceeding against the officers to whose charge it was committed, who were answerable only to the State, and must act as she directed. They might be set in motion by her, but she could not be bound through them.³

In *Hagood v. Southern*,⁴ the State of South Carolina by an act of March 2, 1872, provided for the issue of revenue-bond scrip, and that the same should be received in payment of taxes, and further for the levy of a tax of three mills on the

¹ *Seibert v. Lewis*, 122 U. S. 284. See *ante*, 709.

² *Louisiana v. Jumel*, 107 U. S. 711, 724.

³ See *Hagood v. Southern*, 117 U. S. 67.

⁴ 117 U. S. 51.

dollar, to be employed in the redemption of the scrip. Acts were subsequently passed forbidding any State or county officer to receive revenue-bond scrip in payment of taxes, and repealing the section providing for an annual tax of three mills on the dollar. A great depreciation of the revenue-bond scrip ensued, and the plaintiff, who was a large holder, filed a bill setting forth the above facts and praying the Comptroller-General might be compelled to perform the duties enjoined upon him by the act of March 2, 1872, by directing the several county auditors to take proper measures for the levy and collection of the three-mill tax, and that the county treasurer should be required to receive the revenue-bond scrip in tender of taxes due the State.¹

The court held that the suit was virtually against the State, through her officers, to enforce the specific performance of the contract which she had made with the defendant and therefore within the prohibitory words of the Eleventh Amendment.²

¹ Hagood v. Southern, 117 U. S. 67.

² Hagood v. Southern, 117 U. S. 52, 67.

“The controversy in which the validity and obligation of the scrip are involved is the subject of the present suits. The complainants, as holders of this scrip, in behalf of themselves and of all other holders choosing to take part, are seeking to obtain by judicial process its redemption by the State, according to the terms of the statute in pursuance of which it was issued, by the levy, collection, and appropriation of special taxes pledged to that purpose, as they claim, by an irrepealable law, constituting a contract protected from violation by the Constitution of the United States. And such are the decrees which have been rendered according to the prayer of the bills. These suits are accurately described as bills for the specific performance of a contract between the complainants and the State of South Carolina, who are the only parties to it. But to these bills the State is not in name made a party defendant, though leave is given to it to become such if it chooses; and except with that consent, it could not be brought before the court and be made to appear and defend. And yet it is the actual party to the alleged contract, the performance of which is decreed, — the one required to perform the decree, and the only party by whom it can be performed. Though not nominally a party to the record, it is the real and only party in interest, the nominal defendants being the officers and agents of the State, having no personal interest in the subject-matter of the suit, and defending only as

The line between judicial and ministerial acts cannot al-

representing the State. And the things required by the decrees to be done and performed constitute a performance of the alleged contract by the State. The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is therefore substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States, which declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

"The cause comes thus directly within the authority of *Louisiana v. Jumel*, 107 U. S. 711. It was there said, 'The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the State, whose authority has been withdrawn in violation of the contract, without the State itself in its political capacity being a party to the proceedings. The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the State, whose creatures they are, and to which they are ultimately responsible in law for what they do. They must use the public money in the treasury, and under their official control, in one way, when the supreme power has directed them to use it in another; and they must raise money by taxation, when the same power has declared that it shall not be done.' And the remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question, until the bonds, principal, and interest were paid in full, and that, too, in a proceeding in which the State as a State was not, and could not, be made a party.

"It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them, as against the political power, in their administration of the finances of the State.

"If this case is not within the class of those forbidden by the Constitutional guarantee to the States of immunity from suits in federal tribunals,

ways readily be drawn ; and in *Ex parte Virginia*,¹ it was held that the selection of jurors belongs to the latter class, as involving no discretionary power that can bring it within the scope of the former. It followed that an indictment might be maintained against a judge of a State court for "excluding or failing to select as grand and petit jurors certain citizens of the county of Pennsylvania of African race and black color, and on account of their race, color, and previous condition of servitude, and for no other reason." Whether an act was ministerial or judicial depended on its character, and not on the character of the agent by whom it was performed ; and the selection of jurors was as purely ministerial as the levy of an execution by the sheriff. It could not therefore be said that the act of Congress under which the indictment was drawn was unconstitutional, as imposing penalties upon State judges for their judicial action.

The conclusion is indisputable, if jurors must be taken as they come to hand, without regard to intelligence, character, and the other qualities which should be present in men

it is difficult to conceive the frame of one which would be. If the State is named as a defendant it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a State could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, What would constitute such a proceeding?

"When a suit is brought in a court of the United States against officers of a State to enforce performance of a contract made by the State, and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the performance of the contract by the State, and the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the State, the State is the real party against whom the relief is sought, and the suit is substantially within the prohibition of the Eleventh Amendment to the Constitution of the United States."

¹ 100 U. S. 339, 348.

who are to be judges of fact over their fellow citizens. If, on the other hand, as most persons will admit, persons who fall below a certain level should not be placed in the jury-box, the question where disqualification begins may require the exercise of a nice discrimination.¹ A challenge on the ground of imbecility or insanity may call all the judicial faculties into play; and no man who might be dismissed from the panel for such a cause should be enrolled on the list from which the jury is drawn. Were it not therefore for the authority of a majority of the court we might agree with the minority that the proceeding was virtually against the State, and an attempt to control a discretionary power vested in her judges, contrary to the principle laid down in *Cunningham v. The M. & B. R. R. Co.*²

Taxation involves classification and assessment, and may be thought to require the exercise of a discretion that cannot properly be controlled by process. In *Seibert v. Lewis*,³ a Missouri law providing for the levy and collection by the county courts of such taxes as should be requisite for paying the bonds which might be issued by counties for promoting the construction of railroads, was nevertheless held to be a contract between the State and the bondholders, which could not be impaired by subsequent legislation, and might be enforced by compelling the judges to do what the legislature had forbidden except on a condition which was not fulfilled. A *mandamus* from the Circuit Court of the United States, requiring the County Court of Cape Girardeau to make a levy on all the real estate and personal property in Cape Girardeau township subject to taxation, including statements of merchants and manufacturers doing business in said township was accordingly sustained, although the legislature of Missouri had in the meantime provided that no such tax should be levied without the approval of the State Circuit Court. The proceeding was virtually an action against the State for the specific performance of a contract that the

¹ See *post*, p. 00.

² 109 U. S. 416, 453.

³ 122 U. S. 284.

amount requisite for the payment of township bonds should be levied by the county courts, and some discrimination is needed to reconcile the result with the language held in *Hagood v. Southern*.¹

Whether relief can be given in equity at the instance of a citizen, in a matter which directly or indirectly concerns a State, depends in general on the rules of chancery pleading; which are, on the one hand, that a party whose relation to the cause is merely formal need not be joined where he cannot be served or is not amenable to process; and on the other, that a chancellor will not proceed without having every one before him whose interest will be materially affected by the decree. When, therefore, a State is in the latter category the bill can neither be prosecuted without her, consistently with justice, nor against her under the Eleventh Amendment, and must consequently be dismissed.² In *Cunningham v. M. & B. R. R. Co.*, the Governor of Georgia indorsed the bonds of a railway company under a statute providing that they should be a lien operating as a mortgage on all the property of the company, and that if they were not paid at maturity he might enter and proceed to a sale. Default having been made by the company, a sale took place in pursuance of the statute, and the State became the purchaser. A bill was then filed against the Governor, State Treasurer, and the directors of the railway, averring that bonds were indorsed subsequently to the first issue and before the sale, and purchased by the complainants who thereby became entitled to the benefit of the statutory lien, and asking that the sale should be set aside as having been made in fraud of their rights, or that the property should be decreed to be in trust for them. The court held that inasmuch as the relief prayed for would affect the title of the State, the suit was virtually against her, and could not be maintained. Harlan and Field, JJ., dissented on the

¹ 117 U. S. 51. See *ante*, p. 1068.

² *Cunningham v. The M. & B. R. R. Co.*, 109 U. S. 446, 456; *Poin-dexter v. Greenhow*, 114 Id. 279-287; *Hagood v. Southern*, 117 Id. 52; *In re Ayers*, 123 U. S. 443.

ground that the case fell directly within the jurisdiction of the Circuit Court, as defined in *The United States v. Lee*,¹ and it appeared from the allegations of the bill, as admitted by the demurrer, that the property, though held by officers of the State as her absolute property, was not rightfully so held. In contemplation of law a State cannot do or participate in a wrong, and the defendants must be regarded as acting on their own responsibility, and without a principal on whose command they could rely as a justification.²

When the question arose in a recent instance,³ the court held that whether a State is a party to the suit within the meaning of the Eleventh Amendment depends on the nature of the case as presented by the whole record, rather than on the persons who are set forth nominally as defendants; and where they have no substantial interest, and the State is the only party that will really be affected by the judgment, "if the jurisdiction does not fail for want of power over the parties, it fails as to the nominal defendants for want of a suitable subject-matter." A bill filed to enjoin the auditor of the State of Virginia, its attorney-general, and district attorneys from bringing suits against tax-payers who had tendered the coupons which the State had agreed to receive in payment was consequently dismissed, because the decree would preclude the State from employing the only agents through whom she could collect the sums alleged to be due, while they would remain personally unaffected. Brought to such a test, *Osborn v. The Bank of the United States*, as the court intimated, seems questionable, and may hereafter be overruled in the excess of zeal for State sovereignty. The defendants were there in effect stakeholders of a sum of money which they had taken from the bank for a tax imposed by the legislature of Ohio, and would have to pay over to the State treasury if the cause was decided in their favor. The interest of the State was therefore as manifest as that they had none. The true view, as given by Chief-Justice Marshall, is

¹ See 106 U. S. 196.

² See *ante*, p. 897.

³ *In re Ayers*, 123 U. S. 143.

that an agent is not less responsible for a wrong because he acts at the command of a principal who is exempt from process; and as the judgment does not affect the State with a liability or debt, and simply prevents her from profiting by an unlawful act done on her behalf, it is not against her in the sense of the Eleventh Amendment.

The discussion *In re Ayers* took a wide range, but the point actually decided was that a State can no more be specifically compelled to fulfil a contract through a proceeding against her officers than if she were directly sued. This view is not at variance with the decisions that an injunction may be issued to prevent a deprivation of liberty or property, although the defendant is acting on behalf of the State, and relies on an unconstitutional command of the governor or legislature as a justification. A bill cannot be filed to compel a State to keep faith by receiving her promises to pay as payment; but a tax-payer who has made such a tender may enjoin the collector or treasurer from levying on his property, or recover it back in detinue or replevin. For like reasons a State cannot appear in court as plaintiff against another State when she has no real interest, and the proceeding is instituted on behalf of an individual who could not recover in his own name.¹ Such a method would aggravate the inconvenience which the Thirteenth Amendment was intended to obviate, by enabling a State to act as the representative or assignee of creditors, and proceed to a judgment which could not be enforced without coercing the debtor State, contrary to the intent of the Constitution that the authority of the United States shall be exercised only on individuals.

The rule will not be enforced when it will defeat the equity which it is intended to promote; nor to screen an agent from his share of responsibility for a wrongful act done at the command of his principal; nor when the command is one which the principal is powerless to give, and the

¹ *New Hampshire v. Louisiana*, 108 U. S. 76; *In re Ayers*, 123 Id. 443, 489.

wrong is in contemplation of law exclusively the agent's. Such is the case when the authority of a State is relied on as a justification for the breach of a contract which she has made, or a deprivation which she is forbidden to inflict, and a remedy may then be afforded against the defendant, although the State is not and could not be joined in the bill.¹

If a collector is about to distrain for taxes that could not be laid consistently with the Constitution of the United States, or that have been tendered in coupons which the State agreed to receive as cash, or the property of the taxpayer is taken under such circumstances as a distress, the wrong may be dealt with as if the State were not concerned, and an injunction issued against the collector and the persons claiming under him; or the complainant may recover his land or goods in a replevin or ejectment.² Such, also, agreeably to the *United States v. Lee*, is the principle when such a wrong is done or deprivation inflicted under an act of Congress or an order from the President.³

It was justly said in *Cunningham v. The M. & B. R. R. Co.*,⁴ that "no money, decree, or judgment can be entered against a State in terms, or through her officers or treasurer," and the court also declared that a foreclosure suit must also fail. The latter proposition may be a logical inference from the former, because a decree of foreclosure necessarily involves a computation of the amount due by the mortgagor, and is in effect an execution against the property which has been pledged as a security for payment, which, agreeably to the practice in this country, may be enforced by a sale. But it does not follow that redress should be withheld from a mortgagee because the property is also mortgaged to the State, or that he will lose his remedy if she enters into possession or buys under a power of sale fraudulently, or in

¹ *Osborn v. The Bank of the United States*, 9 Wheaton; Poindexter v. Greenhow, 114 U. S. 271. See *ante*, 897.

² *Osborn v. The Bank of the United States*, 9 Wheaton; Poindexter v. Greenhow, 114 U. S. 271; *Allen v. The B. & O. R. R. Co.*, 114 Id. 311.

³ 106 U. S. 196.

⁴ 109 U. S. 446.

violation of the purpose for which it was conferred. Under these circumstances both parties claim under the same grantor; and as the question is which has the better right to a title which each treats as good, the State should not, by arbitrarily or illegally seizing the property in dispute, preclude a judicial inquiry, or acquire not only nine but ten points of the law. Such a case is different from that where the complainant claims under an independent title, which the State contests.

The judgment in *Cunningham v. The M. & B. R. R. Co.*¹ may also be thought to clash with the conclusion reached in *The United States v. Lee*. In both instances the Government derived title under proceedings which, though regular on their face, were impeached for a latent flaw, — the allegation being in the former case a breach of trust, in the latter a fraudulent rejection of a tender. If the charge was true the title of the State was invalid, and she could not constitutionally direct that the property should be held to the exclusion of the rightful owner. Yet the court admitted the evidence and gave relief in one case, and dismissed the bill in the other.

In the above instances the defect lay in the proceeding through which the title was acquired, but the owner would seem equally entitled to redress where a State claims under a vendor who has sold what he could not lawfully confer. A bad title is not rendered good by such a transfer; nor can a man who has conveyed his property deprive the purchaser by subsequently granting it to the State. Whenever, therefore, title in a State or the general government is alleged in bar of a suit against individuals for specific property the court should inquire into the reality of the defence. If the property is hers the suit will fail, if it is not the State cannot sanction a deprivation which she is forbidden to inflict.² There is no middle ground between such a course and holding that a bald allegation by the Attorney-General that the title of a State or of

¹ 109 U. S. 446. See *ante*, p. 1072.

² 106 U. S. 196; see *ante*, p. 889; *Osborn v. The Bank of the United States*, 9 Wheaton p. 738.

the United States is involved must be blindly accepted by the court, — a contention which was overruled in the United States *v. Lee*.¹

Fully to understand the Eleventh Amendment we must recur to the controversy which led to its adoption. Agreeably to Hamilton's interpretation² the clause extending the judicial power of the United States "to controversies between a State and citizens of another State" was not intended to lay the States open to suits for pecuniary demands which if successful would deprive "the State governments of the privilege of paying their own debts in their own way, free from any constraint but that which flows from the obligation of good faith." This was the more obvious because if the plaintiff obtained judgment it could not be enforced except through a war against the defaulting State, or the hardly less objectionable means indicated in Story on the Constitution, of a *mandamus* to the State treasurer, which would place the revenues of the State under the control of the courts. If the clause warranted a suit against a State a like view should be taken of the analogous words relating to "controversies where the United States shall be a party," and yet no one contended for such an interpretation. Had not this argument been overruled in *Chisholm v. Georgia*³ there would

¹ See the dissenting opinion of Harlan & Field, JJ., in *Cunningham v. M. & B. R. R. Company*, 109 U. S. 461. "Although held by officers of the State as her absolute property, it is not rightfully so held. It is this aspect of the present decision which constrains me to dissent from the opinion of the court. If the citizen asserts a claim or lien upon property in the possession of officers of a State, the doors of the courts of justice ought not to be closed against him because those officers assert ownership in the State. The court should examine the case so far as to determine whether the State's title rests upon a legal foundation. If that title is found to be insufficient, and if the State, claiming its Constitutional exemption from suit, refuse to appear in the suit as a party of record, the court ought to proceed to a final decree as between the complainant and those who are in possession of the property, leaving the State to assert her claim in any suit she might bring. This must be so, otherwise the citizen may be deprived of his property and denied his legal rights, simply because the officers of a State take possession of and hold it for the State."

² *Federalist*, No. 81.

³ 2 Dallas, 419.

have been no occasion for the Eleventh Amendment; and we may consequently believe that it was intended to bring the Constitution back to the ground taken by Hamilton, and not to enable, as has been contended, the agents of a State to despoil her citizens, and then rely on her sovereignty as a defence to an action brought to compel restitution.¹

¹ See *ante*, p. 889.

LECTURE L.

The Judiciary Act of 1789 as contrasted with subsequent Legislation. — Removal of Causes under the "Force Bill," and the Revised Statutes. — Jurisdiction under the Patent Laws, and as to Contracts for the Sale and Letting of Patents. — Petitions for the Removal of Causes, and what they must set forth. — The State Court cannot inquire into the Facts, but both Courts stand at the same Level as regards the Law; and neither can bind or conclude the other. — The Circuit Court cannot take the Case, and the State Court should not let it go, unless the Record shows that the Circumstances justify and require the Change. — Both courts may proceed notwithstanding the Filing of the Petition, subject to a Writ of Error to the Supreme Court of the United States. — It is enough, when the Jurisdiction is original, that the parties should be from different States at the Time when the Judgment is entered; but the Cause cannot be Removed on the Ground of Citizenship, unless the requisite Conditions exist when the Suit is instituted, as well as when the Application is made. — The Right of Removal cannot be circumscribed by State Legislation. — In determining whether the Right exists the Court will have Regard to the actual Relations of the Parties, and not to the Order in which they are ranged by the pleader. — Inconveniences incident to the Removal of Causes under the existing laws. — Separable Controversies, and Removal for local Prejudice or Influence.

WE have seen how far reaching is the grant of judicial power, including as it does not only questions arising out of the principles and working of the government and the restraints imposed on the several States, but cases of admiralty and maritime jurisdiction, and every case which though founded on the State laws involves a federal question whether it is or is not controverted or put at issue, and still further controversies which though not concerning the Constitution or laws of the United States, are between citizens of different States, or where an alien is a party. While such potentially is the jurisdiction of the United States it does not follow that the full measure of the authority should be vested in the

federal tribunals. The Constitution declares how far the judicial power of the government shall extend, but the question whether it shall be exercised is left to Congress. If, as the language held in *Martin v. Hunter*¹ would seem to imply, the federal courts should, to carry out the intent of the Constitution, be empowered to take cognizance of every question arising under its provisions or the laws of the United States, the whole duty of Congress in the premises will be fulfilled by giving a writ of error to the Supreme Court of the United States. Such, as we have seen, was the method adopted at the outset of the government while it was inspired or guided by the framers of the Constitution; and we may believe that it was eminently wise. Save in the single instance of a controversy between citizens of the same State claiming under grants from different States, it was only where the character of the parties gave jurisdiction that a suit could be brought in the circuit courts of the United States under the Judiciary Act of 1789, and the power of removal was confined to cases where an alien, or a citizen of another State, was sued in a State court by a citizen of the State. Questions arising under the Constitution and laws of the United States, with the exception above noted, were relegated in the first instance to the State tribunals, and it was only when the decision of the highest court of the State was adverse to some right or privilege derived under the general government that the Supreme Court of the United States could be called on to correct the error.

This system was well calculated to maintain the dignity of the court and give time and opportunity for the mature deliberation requisite for the performance of its exalted function as the guardian and interpreter of the national Constitution. *Nec deus intersit nisi dignus vindice nodus* is a maxim which applies in public life not less than on the stage, and should not be overlooked in regulating the intervention of the tribunal which is to act as the balance-wheel of the Constitution.

The jurisdiction conferred by the Constitution may, as we have seen, be original or appellate, and cases which are within

¹ 1 Wheaton, 328.

the grant of judicial power may be brought before the federal courts in three different ways: first, in the ordinary mode, by the service of process, and filing a libel or declaration in a circuit or district court of the United States; secondly, by the removal of causes which have been commenced in the State tribunals into the circuit courts of the United States; thirdly, by a writ of error from the Supreme Court of the United States, or an appeal to that tribunal.

The power of removal, like that to proceed originally, was at first limited to cases where there might be a failure of justice if it were withheld. Under the Judiciary Act of 1789 a suitor who came voluntarily into a State court as plaintiff had to abide by his choice, whether the defendant was or was not a citizen of the State; and the cause could not be removed by the defendant unless he was an alien or a citizen of a different State from that in which he was sued. Such was the rule as it regarded the character of the parties, and there could be no removal for the nature of the cause of action except when the controversy lay between citizens of the same State, claiming under grants of land from different States. This reticence was not due to any doubt as to the existence or scope of the power, but from a well-founded belief that the great mass of private rights growing out of the customary and statute laws of the several States should be left to their tribunals, with the privilege of taking any federal question which might actually arise in the course of the proceedings to the Supreme Court of the United States; and when the occasion required it Congress did not hesitate to adopt a different and more stringent policy.

The Force Bill of March, 1833, provided, in view of the threatened resistance of South Carolina to the collection of the revenue, that whenever a suit or prosecution was commenced in a State court against an officer of the United States or other person, for an act done under the revenue laws of the United States, or under color thereof, or for or on account of any right, authority, or title set up or claimed by the defendant under any such law, the case might be removed before trial into the federal court of the proper district; and that a *habeas corpus* might issue for the relief of any person confined by

any authority or decree for any act done in pursuance of an authority from the United States.¹

It is noteworthy that so little were the United States inclined to enlarge their powers that down to the passage of this bill the collectors of the ports, the revenue officers, the marshals of the circuit courts, and all other persons in the civil and military service of the United States were left to the jurisdiction of the State tribunals, and might, like other individuals, be brought to trial and convicted, or made answerable in damages, for an alleged violation of the local laws, without any power on the part of the government to intervene for their protection except through a writ of error from the Supreme Court of the United States for the correction of any mistake that might be committed in point of law. The first material change in the relations of the State and national tribunals was recommended by Jackson, and, as I have already stated, was passed by Congress in response to a statute of South Carolina rendering the collection of duties in that State penal; and it is not surprising that when secession came thirty years afterwards from the same quarter the power of removal was carried to an extreme. The act of March 3, 1863, passed during the height of the Civil War, provided that any suit or prosecution instituted in a State court for an act done by virtue of any order given by the President or under color of his authority, or that of an act of Congress, might be removed to the circuit courts of the United States of the district, and that thereupon the jurisdiction of the State court should cease.²

¹ See *Tennessee v. Davis*, 100 U. S. 257, 302; *Passmore Williamson's Case*, 26 Pa. St. 1.

² Although the right of removal ought not to lie dormant when there is need for its exercise, it is nevertheless attended with serious inconveniences which should render Congress slow to substitute it for the long-established method of appeal; and the decisions of the Supreme Court of the United States present numerous instances where the exercise of the power has led to a reversal on technical grounds, attended with delay, and ending in a failure of justice.

The operation of such statutes and the effect which they may have in hindering the ordinary course of justice are shown by the case of *Hodgson v. Millward*, 3 Grant, 406; 5 Phila. 243, 302. Suit was there brought

With these and some other exceptions of a like kind, the in the Supreme Court of Pennsylvania sitting at *Nisi Prius* against the marshal of the Circuit Court of the United States for a trespass committed by entering the premises of the plaintiff, who was the editor of a newspaper, and carrying away the type and printing-presses. The defendants justified under a warrant from the district-attorney of the United States, alleging that the property in question had been used in the publication of libellous and seditious articles against the government, and reciting an order from the President of the United States that it should be seized for confiscation under the act of 1861. This defence was overruled and a verdict found for the plaintiff on the ground that the alleged order was not proved or produced, and that the writing brought into court was not the due process of law required by the Fifth Amendment, and certainly not a justification for an unreasonable search and seizure contrary to the Fourth. A petition was then filed in the same tribunal for the removal of the cause to the Circuit Court of the United States under the fifth section of the act of March 3, 1863. It was contended on the plaintiff's behalf that the act was unconstitutional, and that even if Congress could establish a dictatorship, or confer despotic power on the President, there was no sufficient evidence that the trespass was committed by virtue or under color of authority from him, or of an act of Congress. Both objections were overruled. The record showed, agreeably to the view taken by the court, that the defendants acted under a warrant reciting an order from the President, signed by the district-attorney of the United States as such, and directed to William Millward, marshal. This was such a color of authority as the statute contemplated; an appearance of right might give color where there was no substance. It was not necessary to express an opinion with regard to the validity of the act of Congress. Whether constitutional or not, it raised a question which might be withdrawn from the State courts and referred to a federal tribunal. A motion subsequently made in the Circuit Court to set aside the order of removal, and remit the cause to the Court of *Nisi Prius* was dismissed by Judge Grier, who said that if the defendants had a justification it was under an act of Congress; and they might require that it should be heard and determined by the national tribunals.

A like question arose in *Kulp v. Ricketts*, 5 Phila. 305. The plaintiff had been arrested and imprisoned by the chief of police of the borough of Wilkesbarre, by virtue of an order from the Secretary of War for discouraging and endeavoring to prevent enlistments. He sued for damages in the Common Pleas of Luzerne County, and the defendant sought to have the case removed to the Circuit Court of the United States. The Common Pleas held that although the proceeding was on its face simply an action of trespass by one citizen of Pennsylvania against another, the petition of removal showed that the defence turned upon an act of Congress. The case was therefore clearly within the grant of judicial power to the United States, and the removal must be allowed.

course marked out by Congress in the last century was pursued for more than seventy years with a success and general acquiescence that might have induced the legislature to pause before venturing on a change which was not regarded as desirable, either by the Bar or the community. The wisdom of the fathers is, however, not infrequently foolishness in the eyes of the children; and when the Civil War brought the dangers incident to the abuse of State rights into relief, there was a natural tendency to enlarge the scope of the federal powers, without considering whether the government would not be as efficient within its original bounds. The dominant motive was apprehension of the South, as reorganized after the rebellion with the increased representation resulting from the Fifteenth Amendment; and it had such a hold on the public mind that Congress did not always sufficiently consider the effect of the measures which it dictated on the country as a whole. Nowhere is the drift towards centralization more apparent than in the limitations imposed on the jurisdiction of the State courts by the Revised Statutes, and by the act of March 3, 1875, which translated the Third Article of the Constitution into laws without the nice discrimination shown in the Judiciary Act of 1789. Not only was original jurisdiction conferred on the federal courts in all controversies arising under the Constitution or laws of the United States, but either party might remove such a cause from the State courts after their jurisdiction had attached, although he was not only a citizen of the State, but had brought the suit, and assigned no cause for taking it from the tribunal which he had selected. A litigant might consequently proceed, in the first instance, in the courts of his own State, and, after ascertaining the views of the judges, transfer the action to the Circuit Court in the hope—which in some instances amounted to a certainty—of a more favorable reception. As the law stood before these acts an alien or a citizen of another State, who was sued by a citizen of the State in which the action was brought, might remove the cause; but no such privilege could be exercised by a plaintiff, or simply on the ground that the case involved a federal question. Under these acts cases arising under the Constitu-

tion and laws of the United States might be transferred to a circuit court, whether the person who filed the petition was plaintiff or defendant, and though he was a citizen of the State, and presumably secure of an impartial hearing.

The magnitude of this innovation, and the effect which it may have on the relations of the State and national tribunals, will be apparent if we reflect that if any part of a cause is within the grant of judicial power the entire cause is within it,¹ and that in determining this question we must consider, not what is actually pleaded or put at issue, but whether any Constitutional provision or law of Congress is so far material to the right asserted on the one side, or the answer made on the other, that if the law were repealed, or the Constitution abrogated, the plaintiff would not be entitled to judgment, or the defence would fail. It is immaterial that the plaintiff does not mean to raise, or the defendant to contest, the point, because he may do so; and jurisdiction, as Chief-Justice Marshall pointed out, does not depend on the course taken by the parties, but on the ground covered by the judgment. Thus a suit on a bond or promissory note depends, so far as the contract is concerned, on the law of the State; but inasmuch as the demand is for lawful money of the United States, which involves the constitutionality of the Legal-Tender Acts, and the judgment will determine whether payment is to be made in notes or coin, the case arises under the Constitution and laws of the United States, and theoretically may be removed to the Circuit Court.² It is not surprising that the disposition of the legislature to carry the jurisdiction of the United States to an extent which overburdens the court of last resort should dispose the latter to adjust the scale by inclining in the opposite direction; and such a tendency is apparent in a recent case of much importance, from the nature of the controversy and as a precedent.

In *Hartell v. Tilghman*³ the court held that a suit could

¹ *Starin v. New York*, 115 U. S. 248, 259; *Southern Pacific R. R. v. California*, 118 Id. 109.

² See *ante*, p. 990; *Trebilcock v. Wilson*, 12 Wallace, 687.

³ 99 U. S. 547.

not be maintained in the federal courts to obtain redress for an alleged violation of a contract, although the subject-matter was a patent, owing its existence to the Constitution of the United States, and there would have been no cause of action had the patent laws been repealed. The complainant filed a bill alleging that he was the original inventor of a process for engraving by means of a sand-blast, and that he had agreed that the defendant should use the invention on the performance of conditions which the latter had not fulfilled, and was on the contrary using the sand-blast without performing his part of the agreement. The bill concluded with a prayer for an injunction to prevent the infringement and for an account. The defendant pleaded a license, which he failed to prove, and the court below decreed the relief asked for. The bill was filed under the act of 1836, which conferred jurisdiction on the circuit courts in suits in law or equity arising under the patent or copyright laws of the United States. No instance could well be more directly within the rule laid down in *Osborn v. The Bank of the United States*, that jurisdiction depends, not on what is actually traversed, but on what might be put at issue, and will be concluded by the judgment. If the case disclosed by the bill was one arising under the patent laws, the defendant could not, consistently with that decision, put the plaintiff out of court by conceding the validity of the patent and relying on the contract as a justification. Laying this view aside and considering the case in the aspect in which it was regarded by the court above, as a suit for the specific performance of a contract, and not to obtain redress for an infringement, we should still be led to the same conclusion. Taking the plea and bill together, the case involved two material questions: Had the plaintiff an exclusive right to the invention? Did the contract vest the right in the defendant, or afford a justification for what would otherwise be an infringement? Unless the United States could Constitutionally confer such a right, the defendant was entitled to judgment, notwithstanding any failure on his part to substantiate the plea by evidence. It is essential to the validity of a contract of sale, that the vendor shall have the right which he undertakes to vest in the

purchaser; and if his title depends on an act of Congress the court cannot close their eyes to the fact in rendering judgment, or say that the case does not arise under the laws of the United States. It might therefore be said in this instance, as it was said in *Osborn v. The Bank of the United States*, of the act incorporating the bank, that but for the patent laws the plaintiff would have no case, that if they were repealed the case would fail, and that he could not come into court without bringing those laws and the Constitution by virtue of which they were enacted, in his hand. The suit might no doubt have been brought in a State court, because it involved the interpretation and effect of a contract; but it would seem to have been not less clearly within the grant of the judicial power to the United States.

Waite, C. J., and Swayne and Bradley, JJ., dissented, and the latter said: "It may be laid down as a general principle that where a case necessarily involves a question arising under the Constitution or laws of the United States, and cannot be decided without deciding that question, it is a case arising under the Constitution and laws, and may be brought, as the law now stands, in the Circuit Court of the United States, although other questions may likewise be involved which might be tried and decided in the State courts. I do not believe in the doctrine that the presence of a question of municipal law in a case which necessarily involves federal questions can deprive the federal courts of their jurisdiction. It is too narrow a construction of the judicial powers and functions of the federal government and its courts."

The view thus expressed is in entire accordance with the judgment in *Littlefield v. Perry*,¹ where it was held that a suit which raises a question of infringement is an action arising under the patent laws, and the party who is entitled to compensation for such a wrong may proceed in the Circuit Court of the United States. Such a suit may involve the construction of a contract as well as the patent, but that will not oust the court of its jurisdiction. If a patent is involved it carries with it the whole case.

¹ 21 Wallace, 205, 230.

The change was not less great as regards the character of the parties. A defendant who was an alien, or who was sued in a State where he did not reside, by a citizen of another State, might remove the cause under the Judiciary Act of 1789; but no such privilege could be exercised simply on the ground that the parties on one side were not citizens of the same State as the parties on the other. Agreeably to the act of 1775, all controversies between citizens of different States might be brought in or transferred to the federal tribunals, although the party who asked for the removal was a citizen of the State, and presumably secure of an impartial hearing.

The act of March 3, 1875, provided that all suits arising under the Constitution and laws of the United States and all controversies between citizens of different States might be brought in the Circuit Court of the United States; and that every such case might be withdrawn from the State courts at the will of either party. All that was requisite for such removal under this statute was that the applicant should file a petition in the State court before or during the term at which the cause could be first tried and before the trial thereof, attended by a bond with good and sufficient surety for his or their entering a certified copy of the record in the Circuit Court of the proper district at its then next session, and paying all costs that might be awarded by the Circuit Court if it was of opinion "that the suit was improperly removed;" and thereupon it became the duty of the State court "to proceed no further," and that of the Circuit Court to "proceed in the same manner as if the suit had originally been commenced therein." The cause might be remanded if the removal proved to be erroneous; but as this could not be ascertained in many instances without a minute inquiry into controverted facts, and the decision might be reviewed on a writ of error by the Supreme Court of the United States, a hearing on the merits might be indefinitely postponed at the will of either party.

These clauses, which are still in force, except so far as they have been modified or repealed by the act of 1887, were not distinctly drawn. They provide for the filing of a petition,

but do not state what it must set forth, or require that its allegations shall be verified by an oath. As the State court "is not obliged to forego its jurisdiction until a case is made out which on its face shows that the petitioner can remove the cause as a matter of right,"¹ and may consider whether the prayer is well founded in point of law, we may infer that its hand cannot be stayed by a bald allegation that the case is one arising under the Constitution or laws of the United States, nor without specifying the matters on which the petitioner bases his application.² But the question which tribunal had cognizance of and was entitled to inquire into the facts was long doubtful, although it is now settled in favor of the federal tribunals.³ If the petition is filed in due form, and sets forth the necessary facts, it is the duty of the State court to proceed no further; and every subsequent step will be erroneous and a ground of reversal. The *dicta* in some instances have gone further, and to the point that a judgment rendered after the right of removal has been perfected is *coram non judice* and void.⁴ But we may infer from the language held in other instances that such a judgment, though erroneous, cannot be impeached collaterally, and will stand until reversed. A sworn denial that the petitioner is a citizen of another State will not therefore vary the case or enable the State court to retain its hold, although the issue may be tried in the Circuit Court, and the cause sent back if the petition proves to be false.⁵ It may be gathered

¹ See Removal Cases, 100 U. S. 457.

² See *Amy v. Manning*, 144 Mass. 153; *Gordon v. Longest*, 16 Peters, 97; as cited in *Virginia v. Rives*, 100 U. S. 313, 338; *Burlington, Cedar Rapids, & Northern R. R. Co. v. Dunn*, 122 Id. 515.

³ *Stone v. South Carolina*, 117 U. S. 430; *Carson v. Hyatt*, 118 Id. 279; *Burlington, Cedar Rapids, & Northern R. R. Co. v. Dunn*, 122 Id. 513.

⁴ *Virginia v. Rives*, 100 U. S. 313, 338; *Burlington, Cedar Rapids & Northern R. R. Co. v. Dunn*, 122 Id. 515.

⁵ "It must be confessed that previous to the cases of *Stone v. South Carolina*, 117 U. S. 430, 433, and *Carson v. Hyatt*, 118 U. S. 279, decided at the last term, the utterances of this court on that question had not always been as clear and distinct as they might have been. Thus, in *Gordon v. Longest*, 16 Pet. 97, in speaking of removals under sect. 12

from the language held in this case, as cited below, that both courts stand at the same level as regards the law, and that

of the Judiciary Act of 1789, it was said (p. 103), 'It must be made to appear to the satisfaction of the State court that the defendant is an alien, or a citizen of some other State than that in which the suit was brought;' and in *Railway Company v. Ramsey*, 22 Wallace, 322, 329, that 'if upon the hearing of the petition it is sustained by the proof, the State court can proceed no further.' In other cases expressions of a similar character are found, which seem to imply that the State courts were at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal.

"At the last term it was found that this question had become a practical one, about which there was a difference of opinion in the State courts, and to some extent in the circuit courts; and so, in deciding *Stone v. South Carolina*, we took occasion to say 'All issues of fact made upon the petition for removal must be tried in the Circuit Court, but the State court is at liberty to determine for itself whether, on the face of the record, a removal has been effected.' It is true, as was remarked by the Supreme Judicial Court of Massachusetts in *Amy v. Manning*, 144 Mass. 153, that this was not necessary to the decision in that case, but it was said on full consideration and with the view of announcing the opinion of the court on that subject.

"Only two weeks after that case was decided *Carson v. Hyatt* came up for determination, in which the precise question was directly presented; as the allegation of citizenship in the petition for removal was contradicted by a statement in the answer, and it became necessary to determine what the fact really was. We there affirmed what had been said in *Stone v. South Carolina*, and decided that it was error in the State court to proceed further with the suit after the petition for removal was filed, because the Circuit Court alone had jurisdiction to try the question of fact which was involved.

"This rule was again recognized at this term in *Carson v. Dunham*, 121 U. S. 421, and is in entire harmony with all that had been said in the opinions in some of the cases. To our minds it is the true rule and calculated to produce less inconvenience than any other. The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the State court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, — which includes the petition and the pleadings and proceedings down to that time, — that the petitioner is entitled to a removal of the suit. That question the State court has the right to decide for itself, and if it errs in keeping the case, and the highest court of the State affirms its decision, this court has jurisdiction to

if there is a difference of opinion, each of them may proceed to final judgment, leaving the question which has jurisdiction to be determined on error by the Supreme Court of the United States. Such a course may bear hardly on the unlucky suitors who are exposed to untold delay and double costs

correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal, *Stone v. South Carolina*, 117 U. S. 430, and cases there cited.

“ But even though the State court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition, in the Circuit Court, and have the suit docketed there. If the Circuit Court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. *Railroad Company v. Koontz*, 104 U. S. 5, 15. In that case, the same as in the writ of error to the State court, the question will be decided on the face of the part of the record of the State court which ends with the petition for removal; for the Circuit Court can no more take a case until its jurisdiction is shown by the record than the State court can be required to let it go until the record shows that its jurisdiction has been lost. The questions in the two courts will be identical, and will depend on the same record, namely, that in the State court, ending with the petition for removal. The record remaining in the State court will be the original; that in the Circuit Court an exact copy. But inasmuch as the petitioning party has the right to enter the suit in the Circuit Court, notwithstanding the State court declines to stop proceedings, it is easy to see that if both courts can try the issues of fact which may be made on the petition for removal, the records from the two courts brought here for review will not necessarily always be the same. The testimony produced before one court may be entirely different from that in the other; and the decisions of both courts may be right upon the facts as presented to them respectively. Such a state of things should be avoided if possible, and this can only be done by making one court the exclusive judge of the facts. Upon that question there ought not to be a divided jurisdiction. It must rest with one court alone, and that, in our opinion, is more properly the Circuit Court. The case can be docketed in that court on the first day of the next term, and the issue tried at once. If decided against the removal, the question is now, by the act of March 3, 1887, c. 373, 24 Stat. 552, put at rest, and the jurisdiction of the State court established in the appropriate way. Under the act of March 3, 1875, c. 137, 18 Stat. 470, such an order could have been brought here for review by appeal or writ of error, and to expedite such hearings our Rule 32 was adopted.” *Burlington R. R. Co. v. Dunn*, 122 U. S. 513, 515.

without fault on their part, and indicates that the right of removal ought not to extend to any case where it is not necessary to guard against a greater evil.

It follows, on the same ground, that however clearly the petition may bring the case within the rule, the Circuit Court cannot issue an injunction to stay the proceedings in the State court, or preclude the exercise of the legal discretion which the removal acts accord and the State court is bound to exercise for the benefit of the suitor.¹

The decisions at the same time are that a new suit relating to a cause of action which has been transferred, may be stayed by an injunction from the Circuit Court, although it is founded on the judgment of the State court and intended to carry that into effect.²

A different rule obtains in criminal proceedings, where the truth and sufficiency of the matters set forth in the petition must be determined in the court of original jurisdiction, subject to the revisory power of the national court of last resort; and if the accused does not, in the opinion of the trial court, allege and prove enough to give the Circuit Court jurisdiction, he may be tried and convicted, and the case subsequently brought before the Supreme Court of the United States on a writ of error.³

While the grant of judicial power extends to every case which actually or potentially involves a federal element, it does not follow that the right of removal can be exercised merely because such a question might be raised, if the pleadings or evidence show that it is not actually controverted or at issue, and the case in fact turns on points arising under the constitution or laws of the State.

Such is the rule when a case is brought before the Supreme Court of the United States on a writ of error or

¹ *The Chesapeake & Ohio R. R. Co. v. White*, 111 U. S. 134, 137; *Railroad Co. v. Koontz*, 104 Id. 5; *Railroad Co. v. Dunn*, 19 Wallace, 294; *Stone v. Sargent*, 129 Mass. 503; *French v. Hay*, 22 Wallace, 250. See *post*, p. 1103.

² See *post*, p. 1103.

³ *Strauder v. West Virginia*, 100 U. S. 303; *Neal v. Delaware*, 103 Id. 370, 409.

appeal;¹ and it applies when it is sought to preclude a State court from taking cognizance of matters within its appropriate sphere, on the ground that in doing so it may trench on the federal Constitution or an act of Congress.²

The petition must set forth the facts requisite to warrant the removal in point of law, and if this be not done the omission will not be aided by intendment. It is not therefore enough to aver that the petitioner resides in another State, because residence is not necessarily equivalent to citizenship.³ What must be averred to show that the "controversy" is under the Constitution or laws of the United States is not clear, but it has been held that before a circuit court can be required to retain or a State court be obliged to forego a cause, for reasons not involving the citizenship of the parties, "it must appear upon the record by a statement of facts in a legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the State Constitution or some law or treaty of the United States. It is not enough for the party who seeks a removal of his cause to say that the suit is one arising under the Constitution. He must state the facts so as to enable the court to see whether the right he claims does really and substantially depend upon the construction of that instrument."⁴

The jurisdiction of the circuit courts is now regulated by section 639, subdivision 3, of the Revised Statutes, and by the act of March 3, 1875, as repealed, superseded, or amended

¹ *Brown v. Colorado*, 106 U. S. 95; *Detroit R. R. Co. v. Guthard*, 114 Id. 133, 137; *Kansas Association v. Kansas*, 120 Id. 103.

² *Provident Savings Life Insurance Society v. Ford*, 114 U. S. 635, 641; *Germania Ins. Co. v. Wisconsin*, 119 Id. 473, 477; *Starin v. New York*, 115 Id. 248, 257.

³ *Continental Ins. Co. v. Rhoads*, 119 U. S. 287; *Pepper v. Fordyce*, Id. 409; *Evart v. Huntsville College*, 122 Id. 223.

⁴ *Gold Washing Co. v. Keyes*, 96 U. S. 199, 204; *Gibbs v. Crandall*, 120 Id. 105, 109.

by the act of March 3, 1887.¹ The first section of the last-mentioned act reads as follows:—

“The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution and laws of the United States, or treaties made or which shall be made under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign State’s citizens or subjects.”

The second section makes a beneficial change by confining the right of removal to the defendants,—with an exception to be hereafter noted,—and not allowing it to be exercised on the ground of citizenship unless all the parties on one side—when ranged according to their respective interests, regardless of their position on the record—are of different States from the parties on the other side.² The same section also provides that “when there is a separable controversy which is wholly between citizens of different States which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district.”³ Hence, while there can be no removal of a controversy on account of the character of the parties, unless all on one side are of a different State from those on the other, yet if this condition is fulfilled as to a separable controversy the entire cause may

¹ See the *Canal & Claiborne Streets R. R. Co. v. Hart*, 114 U. S. 654.

² *Removal Cases*, 100 U. S. 457; *Barney v. Latham*, 103 Id. 205, 216; *Blake v. McKim*, 103 Id. 336, 339.

³ See *Jefferson v. Driver*, 117 U. S. 272; *Sloane v. Anderson*, Id. 275; *Carson v. Hyatt*, 118 Id. 279.

be taken to the Circuit Court. Such was the construction given to the analogous clause in the act of 1875, in *Barney v. Latham*; ¹ and the language of the act of 1887 is identical, except in limiting the right of removal to the defendants.

To constitute a separable controversy it must grow out of or relate to a distinct demand or cause of action; and one or more of the defendants in a joint suit, whether *ex contractu* or *ex delicto*, cannot by severing in their pleading, and alleging that they are citizens of another State, acquire the right of removal, although the cause of action is joint and several, and the plaintiff might have proceeded severally against each. ² Joint trespassers or tort-feasors may be sued severally, but inasmuch as the demand grows out of the same act, there is no separable controversy; and if the plaintiff chooses to unite them all as defendants, none of them, though domiciled in another State, can transfer the cause. ³

In *Starin v. New York*, ⁴ the suit was instituted to prevent what was alleged to be a concerted attempt by the defendants to infringe the complainant's exclusive right of ferriage; and it was held that though each of them might have been sued severally, there was "but a single cause of action," namely, "the violation of the exclusive ferry rights of the plaintiff by the united efforts of all the defendants." The case was therefore within the rule established in *The Louisville & Nashville R. R. v. Ide*, ⁵ that a separate defence by one defendant in a joint suit against him and others upon a joint or several cause of action does not create a separable controversy, so as to entitle that defendant, though the necessary citizenship exists as to him, to a removal of the cause under the second clause of section 2 in the act of 1875.

When, however, the plaintiff, by erroneously uniting distinct causes of action in the same proceeding, brings a defendant into the State court who might have removed the

¹ 103 U. S. 205, 212.

² *Pirie v. Tvedt*, 115 U. S. 41; *Louisville & Nashville R. R. Co. v. Ide*, 114 Id. 52; *Sloane v. Anderson*, 117 Id. 275.

³ *Thorn Wire Hedge Co. v. Fuller*, 122 U. S. 535.

⁴ 115 U. S. 248.

⁵ 114 U. S. 52.

cause had he been sued alone, he is as much entitled to exercise the right as if such were the case; and the plaintiff cannot allege that the defendant should have demurred instead of asking for a removal, because the fault of pleading is the plaintiff's, and he must submit to the consequences of his mistake. It has nevertheless been decided that if, from the nature of the cause and the diversity of the interests involved, it cannot properly be considered or determined as a whole by the Circuit Court, the removal may be limited to so much of it as is separable and concerns the parties who desire the transfer,¹ notwithstanding the delay of justice to the remaining litigants, who, owing to the entangled nature of the controversy, may be compelled to wait for years on the action of the federal courts before they can proceed in the State tribunal, and then undergo a like probation there.

The act of 1887 also provides that where "there is a controversy between a citizen of the State where the suit is brought and a citizen of another State, any defendant being such citizen of another State may remove such suit into the Circuit Court for the proper district, at any time before the trial thereof, when it shall be made to appear to the said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the defendant may under the laws of the State have the right, on account of such prejudice or local influence, to remove such cause."

A like privilege was conferred on the plaintiff by the act

¹ The Union Pacific R. R. Co. v. The City of Kansas, 115 U. S. 1, 25.

In this instance proceedings were instituted before the mayor of a city and a jury for widening a street, and to ascertain the value of the land taken, and assess the benefits and damages. All the owners of the adjacent land, including the railroad company, were made parties, and the Supreme Court held that the railway company, which was technically a citizen of another State, might require that the compensation they were entitled to, and how much they ought to pay, should be determined by a federal tribunal, although the other owners, who were citizens of Kansas, would have to await the termination of a proceeding in which they took no part, and might be prejudiced without a hearing by the result.

of March 2, 1869, and section 639 of the Revised Statutes, sub-division 3, and may still be exercised; but the act of 1887 directs that the Circuit Court shall, on application of the other party, inquire into the truth of the said affidavit, and the grounds thereof; and unless it shall appear to the satisfaction of the said court that said party will not be able to obtain justice in said State court, remand the cause.

As the law stood under section 639 of the Revised Statutes, prior to the act of 1887, there could be no removal of a cause on the ground of local prejudice, unless all the parties on one side were citizens of different States from those of the other, and the party opposed to him who asked for the removal was a citizen of the State in which the suit was brought.¹ Whether this rule is altered by the change in the phraseology of the act of 1887 must be left to conjecture until the point is ascertained by a judicial decision.

Where an assignment is made colorably for the purpose of giving the federal tribunals jurisdiction, the suit may be dismissed or remanded, under section 5 of the act of March 3, 1875, whenever the fact is made to appear.² But an allegation that an instrument under which one or more of the plaintiffs or defendants claim was collusively executed to keep the cause in the State courts, or prevent it from coming under the grant of judicial power to the United States, will not authorize the Circuit Court to take cognizance of the suit originally, or by removal; and relief can only be had through an application to the State court to vacate the assignment.³

When the removal is not asked on the ground of prejudice or local influence, the petition must, agreeably to the act of 1887, be filed at or before the time the defendant is required by the laws of the State, or the rule of the State court, to answer or plead to the declaration or complaint, — thus sub-

¹ *Jefferson v. Driver*, 117 U. S. 272; *Cambria Iron Co. v. Ashburn*, 118 Id. 54, 58; *Bible Society v. Grove*, 101 Id. 649.

² *Barney v. Baltimore*, 6 Wallace, 280; *Bernard's Township v. Stebins*, 109 U. S. 341, 354; *Little v. Giles*, 118 Id. 596.

³ *Provident Savings Life Insurance Society v. Ford*, 114 U. S. 635; *Oakley v. Goodman*, 118 Id. 43.

stituting a definite rule for the uncertain period prescribed in the prior law.

A want of jurisdiction over the cause cannot be remedied by the subsequent course of events; but it is enough, as it regards the parties, that jurisdiction should exist at the time the judgment is pronounced, although the suit was irregularly brought in the first instance.¹ If, therefore, all the parties on either side are citizens of different States from those on the other when the time arrives for final judgment, it may be valid, although the fact was otherwise at the commencement of the action.²

¹ *Conolly v. Taylor*, 2 Peters, 564; *The Pacific R. R. Co. v. Ketchum*, 101 U. S. 289, 298.

² See *Pacific R. R. Co. v. Ketchum*.

"The bill is filed in the court of the United States, sitting in Kentucky, by aliens and by a citizen of Pennsylvania. The defendants are citizens of Kentucky, except one who is a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court cannot be questioned, so far as respects the alien plaintiffs. As between the citizens of Pennsylvania and of Ohio, neither of them being a citizen of the State in which the suit was brought, the court exercise no jurisdiction. Had the cause come on for a hearing in this state of parties, a decree could not have been made in it for the want of jurisdiction. The name of the citizen plaintiff, however, was struck out of the bill before the cause was brought before the court; and the question is, whether the original defect was cured by this circumstance, — whether the court, having jurisdiction over all the parties then in the cause, could make a decree?"

"The counsel for the defendants maintain the negative of this question. They contend that jurisdiction depends on the state of the parties at the commencement of the suit; and that no subsequent change can give or take it away. They say that if an alien becomes a citizen pending the suit, the jurisdiction which was once vested is not divested by this circumstance. So, if a citizen sue a citizen of the same State, he cannot give jurisdiction by removing himself and becoming a citizen of a different State. This is true; but the court does not understand the principle to be applicable to the case at bar. Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. The court, in the first case, had complete original jurisdiction; in the last, it had no jurisdiction, either in form or substance. But if an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise its jurisdiction while this defect

To give the right of removal under the act of 1875, and as the law now stands, the requisite citizenship must nevertheless exist when the suit is brought as well as when the petition is filed; and if at either period any party on the one side of the controversy is of the same State as a party on the other side, the application will be refused or the cause remanded.¹ The law is so far different as regards removals for prejudice or local influence that the fulfilment of the requisite conditions after action brought and before trial may confer the right although it did not exist when the suit was instituted.² So the removal of a separable controversy depends on the relations of the parties when the application is made; and if the case is then within the statute it is immaterial that the petitioner was originally joined with other persons who were from the same State as one or more of the opposite parties, and the cause could not have been removed until their connection with it had ceased.³ So the removal may take place, although the right of action did not exist at common law,

in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing; and the court would not hesitate to decree in the cause.

"So in this case. The substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens; and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course." *Conolly v. Taylor*, 2 Peters, 566.

¹ *Gibson v. Bruce*, 108 U. S. 561; *Houston & Texas R. R. Co. v. Shirley*, 111 Id. 358; *Mansfield, Cold Harbor, & Lake Michigan R. R. Co. v. Swan*, Id. 379.

² *Hess v. Reynolds*, 113 U. S. 73, 81.

³ *Yulee v. Vose*, 99 U. S. 539. In this instance a citizen of New York proceeded in her courts against certain persons, who were also citizens of New York, and Yulee, a citizen of Florida. The case went to final judgment against the other defendants, but a new trial was granted as to Yulee, and it was held that he thereby acquired a right to transfer the record to the Circuit Court of the United States.

and the statute which confers it provides that the State courts "shall have exclusive jurisdiction of suits brought to carry it into effect." Such a condition is invalid as tending to frustrate the intention of the Constitution to provide an impartial tribunal where there is reason to apprehend that the local tribunals will favor some of the parties to the exclusion of others who come from different States.¹ In this instance the plaintiff, who was a citizen of Illinois, brought a suit in Wisconsin, under letters of administration granted in that State, to recover damages for the death of his wife, owing to the negligence of a railroad company which had been chartered by both States; and it was held that he might remove the cause to the Circuit Court of the United States, although the action was founded on a Wisconsin statute which provided that such suits should be "brought in some court established under the Constitution and laws of the State."²

¹ The Railroad Co. v. Whitton, 13 Wallace, 270.

² "As to the limitation to the State courts of the remedy given by the statute of Wisconsin, — that statute, after declaring a liability by a person or a corporation to an action for damages when death ensues from a wrongful act, neglect, or default of such person or corporation, contains a proviso that 'such action shall be brought for a death caused in this State, and in some court established by the Constitution and laws of the same.' This proviso is considered by the counsel of the defendant as in the nature of a condition, upon a compliance with which the remedy given by the statute can only be enforced. It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the State. . . . But when death does thus ensue from any of these causes, the relatives of the deceased named in the statute can maintain an action for damages. The liability within the conditions specified extends to all parties through whose wrongful acts, neglect, or default death ensues; and the right of action for damages occasioned thereby is possessed by all persons within the description designated. In all cases where a general right is conferred, it can be enforced in any federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such federal court by any provision of State legislation that it shall only be enforced in a State court. The statutes of nearly every State provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts, and in the counties where the land is situated; yet

The rules governing the right of removal are so intricate as to perplex skilful practitioners and the courts, and necessitate numerous journeys up and down the judicial staircase for the determination of points that are foreign to the merits of the cause, attended with a delay or failure of justice which counterbalance any good that may arise from the impartiality of the federal courts. I may add that no act of a State legislature conferring exclusive jurisdiction on a probate court or other tribunal as regards the settlement or distribution of estates after death, the proof of wills, or the compensation due under the right of eminent domain, can affect the jurisdiction of the federal courts over controversies between citizens of different States; nor will the argument *ab inconvenienti*, founded on the delay and expense incident to such a change of forum, weigh in the scales in determining whether the right of removal exists and may be exercised.¹

In determining whether the right of removal exists, the court will consider how the parties are related in interest, rather than the position assigned to them by the pleader, and

it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the federal court over such suits when the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either is established by State legislation, its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to State legislation. *Railway Co. v. Whitton*, 13 Wallace, 270, 285.

"In *Swedam v. Broadnax*, 14 Peters, 67, an act of the legislature of Alabama provided that the estate of a deceased declared to be insolvent should be distributed by the executors or administrators according to the provision of the act, and that no suit or action should be commenced or sustained against any executor or administrator after the estate had been declared to be insolvent, except in certain cases. But this court held, in a case not thus excepted, that the insolvency of the estate judicially declared under the act was not sufficient in law to abate a suit in a circuit court of the United States by a citizen of another State against a citizen of Alabama." *Railroad Co. v. Whitton*, 13 Wallace, 270, 291; see *Union Bank of Tennessee v. Jolly's Administrators*, 18 How. 506; *Payne v. Hook*, 7 Wallace, 425, to the same effect.

¹ *Gaines v. Fuentes*, 92 U. S. 10; *Ellis v. Davis*, 109 Id. 485; *Hess v. Reynolds*, 113 Id. 73, 77.

if all the persons who are entitled to redress are of a different State from the persons against or through whom it is sought, the cause may be removed, although some of the latter stand on record as plaintiffs and others as defendants.¹

It may be inferred from the decisions that the right to take jurisdiction originally, and the right to acquire it by removal, or under a writ of error or appeal, are not necessarily governed by the same rules. In the first instance it is enough that a federal element is potentially involved, because the plaintiff cannot know what course the defendant will take until after the case is brought into court. In the second, the Circuit Court may inquire whether the record or testimony actually presents a case under the Constitution or laws of the United States, and remand the cause if such is not the fact. It is essential, in the third, that a federal question should not only have arisen, but have been decided adversely to the party who wishes to have the judgment reviewed; and unless this appears affirmatively the appeal will be dismissed.²

¹ See the Removal Cases, 100 U. S. 457; *Harter v. Kernochan*, 103 Id. 562; *Carson v. Hyatt*, 118 Id. 279, 286; *Mills v. Brown*, 16 Peters, 525; *Lawler v. Walker*, 14 Howard, 152; *Railroad Co. v. Buck*, 4 Wallace, 177.

² The following citation from the judgment in *Stone v. Sargent*, 129 Mass. 503, gives an instructive summary of the authorities and the conclusions to which they lead, but it is now established that the State court cannot inquire into the facts, although it may consider whether the petition is good in point of law, and proceed to judgment if the paper does not "on its face show" that the motion should be granted. *Stone v. South Carolina*, 117 U. S. 430; *Carson v. Hyatt*, 118 Id. 279, 289; *Burlington R. R. Co. v. Dunn*, 122 Id. 512; *Amy v. Manning*, 144 Mass. 153.

"As appears by the authorities cited by the learned counsel for the defendant, if the case is within the act of Congress, and the proper petition, affidavit, and surety are filed in the State court the Circuit Court of the United States takes jurisdiction of the cause, although the State court omits, or even refuses, to make any order for its removal. In other words, the jurisdiction of the federal court over a case in which the conditions of the act of Congress have been complied with cannot be defeated by any action or omission of the State court.

"On the other hand, it is the duty of the State court, before relinquishing jurisdiction of a cause once lawfully brought before it, and discharging that cause from its own docket, to be satisfied that there has

been a compliance with those conditions. If the highest court of the State errs in holding that the petitioner is not entitled to remove the cause, its judgment may be revised and reversed on writ of error by the Supreme Court of the United States, and all proceedings had in the courts of the State, after due application for a removal, may be ordered by that court to be set aside. But no act of Congress, and no adjudication of the Supreme Court of the United States has made the opinion of the State court, upon the question whether its own jurisdiction must be surrendered, subordinate to the opinion of any Federal tribunal below the Supreme Court. It is, to say the least, a grave matter of doubt whether the Circuit Court of the United States, in such a case as this, could issue a writ of *mandamus* or of *certiorari* to the State court; and if it could it would only be when no copy of the record had been filed in the Circuit Court, and to obtain such a copy for the purpose of guiding its own proceedings, and not to restrain or control the judicial action of the State court. *Ex parte Turner*, 3 Wallace, Jr., 258; *Murray v. Patrie*, 5 Blatchford C. C. 343; s. c. cited 6 Blatchford C. C. 382-386; s. c. *nom. Justices v. Murray*, 9 Wallace, 274, 282, note; *Hough v. Western Transportation Co.*, 1 Bissell, 425; *In re Cromie*, 2 Id. 160; *Osgood v. Chicago, Danville, and Vincennes R. R. Co.*, 6 Id. 330; *United States v. McKee*, 4 Dill. 1.

"In Dillon on Removal of Causes (2d ed.), 77-79, it is said that the Circuit Court of the United States has the power to protect its suitors by injunction against a judgment rendered in the State court after a proper application to remove the cause. But the only authority there cited is *French v. Hay*, 22 Wallace, 250, in which the circumstances were very peculiar, and the judgment in no way supports the position of the learned author. In that case the principal cause had been removed without objection from a State court of Virginia into the Circuit Court of the United States, and the State court of Virginia had not undertaken to retain jurisdiction thereof. The injunction issued by the federal court was not against proceeding with the original suit in the State court of Virginia, but against prosecuting a new suit, commenced in the courts of another State after the right of removal had been perfected upon a decree rendered in the State court of Virginia before the application for removal. The judgment is limited by its language, as well as by the facts before the court, to injunctions to stay suits commenced after the jurisdiction of the federal court has attached; and in any other view would be inconsistent, not only with the clear terms of the acts of Congress, but with earlier and later decisions of the Supreme Court of the United States. U. S. St. March 2, 1793, § 5, U. S. Rev. Sts. 720; *Diggs v. Wolcott*, 4 Cranch, 179; *Watson v. Jones*, 13 Wallace, 679, 738; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 U. S. 340. See also *Bradley, J.*, in *Live Stock Association v. Crescent City Co.*, 1 Abbott U. S. 388, 404, 407; s. c. *Slaughter House Case*, 1 Woods, 21, 34, 37.

“The inconvenience of the construction for which the defendant contends may be made more apparent by applying it to a case in which the amount in dispute is more than five hundred and less than five thousand dollars. Such a case, in the event of a decision in the highest court of the State against a right claimed under the act of Congress, could be taken by writ of error to the Supreme Court of the United States. U. S. Rev. Sts. § 709. But a decision of the Circuit Court of the United States in favor of such a right could not be re-examined in the Supreme Court. U. S. Rev. Sts. § 691, U. S. St. Feb. 16, 1875, § 3. So that the effect would be to make the decision of a circuit court of the United States paramount to the deliberate judgment of the highest court of the State.

“This court has uniformly held that any court of the Commonwealth, before declining the further exercise of jurisdiction over a cause, must consider and determine whether upon the record and papers before it, the petitioner has brought himself within the acts of Congress; and that the ruling of a judge of this court or of the Superior Court upon that question may be revised in the full bench of this court upon bill of exceptions or report of the judge. *Commonwealth v. Casey*, 12 Allen, 214; *Morton v. Mutual Ins. Co.* 105 Mass. 141; *Bryant v. Rich*, 106 Mass. 180; *Florence Sewing Machine Co. v. Grover & Baker Co.*, 110 Mass. 70; *Mahone v. Manchester & Lawrence R. R.*, 111 Mass. 72; *Galpin v. Critchlow*, 112 Mass. 339; *Gordon v. Green*, 113 Mass. 259; *Du Vivier v. Hopkins*, 116 Mass. 125; *New York Warehouse Co. v. Loomis*, 122 Mass. 431. And notwithstanding some *dicta* of the learned justice who delivered the opinion in *Insurance Co. v. Dunn*, 19 Wallace, 214, 223, having an opposite tendency, the practice of this court in this regard is upheld by many decisions of the Supreme Court of the United States, of which it will be sufficient to cite a few of the more recent.

“In *Florence Sewing Machine Co. v. Grover & Baker Co.*, 110 Mass. 70, the defendant filed a petition for a removal of the case into the Circuit Court of the United States under the act of Congress of 1867, which was refused by a justice of this court, upon the ground that the case was not within the act; and upon exceptions to such refusal, and to his rulings at the subsequent trial, his decision was affirmed by the full court. The case was nevertheless entered in the Circuit Court of the United States, and a motion of the plaintiff to remand it was overruled by that court. 1 Holmes C. C. 235. But the Supreme Court of the United States, on a writ of error to this court, affirmed its judgment, without a suggestion that there was any irregularity in its proceedings, or that it had lost its jurisdiction of the case by the entry thereof in the Circuit Court. 18 Wallace, 553.

“So in *Bryant v. Rich*, 106 Mass. 180, a justice of the Superior Court declined to grant a petition for removal under the same act of Congress, on the ground that it was filed too late; and exceptions were taken to his

decision and were overruled by this court. The Supreme Court of the United States, upon writ of error, held, in the words of Chief Justice Waite, that the transfer was properly refused, and affirmed the judgment. *Vannevar v. Bryant*, 21 Wallace, 41. A similar decision was made upon a writ of error to the Supreme Court of Iowa in *Railroad Co. v. McKinley*, 99 U. S. 147.

"In *Fashnacht v. Frank*, 23 Wallace, 416, an alien, whose property had been ordered by a decree of a district court of the State of Louisiana to be sold, at the suit of a citizen of that State holding a mortgage thereon, obtained from the same court a temporary injunction, which upon hearing was dissolved, and afterwards filed a petition, under the act of Congress of July 27, 1866, for the removal of the case into the Circuit Court of the United States, which was refused; and he then appealed from the decree dissolving the injunction to the Supreme Court of Louisiana, which affirmed that decree. The Chief-Justice of the United States, in delivering the judgment of the Supreme Court dismissing for want of jurisdiction a writ of error to the State court, said that the petition for removal 'was at once very properly overruled, for the reason that a final judgment had already been rendered,' and that the appeal to the Supreme Court of the State 'was clearly the appropriate remedy for the correction of the errors of the district court if there were any.'

"In another case, a defendant's petition for removal, under the Judiciary Act of 1789, which alleged the citizenship of the plaintiff at the date of the petition, but not at the time of the commencement of the action, was for that reason refused by the Supreme Court of New York, and its judgment affirmed in the Court of Appeals. *Pechner v. Phoenix Ins. Co.*, 6 Lansing, 411, and 65 N. Y. 195. The case was taken by writ of error to the Supreme Court of the United States, and it was there argued that the compliance with the conditions of the act of Congress ousted the Supreme Court of New York of its jurisdiction; and all further proceedings therein were void. But the judgment was affirmed; the Chief-Justice saying: 'This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal when filed becomes part of the record in the cause. It should state facts which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this he has not in law shown to the court that it cannot "proceed further with the cause."' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended.' The court had to take the case as made by the party himself, and not inquire further. If that was not sufficient to oust the jurisdiction there was no reason why the court might not proceed with the cause. 95 U. S. 183. A like decision was made where petitions under the act of 1867 contained defective allegations of the citizenship of the adverse party; and the Chief-Justice said: 'Holding as we do that a State

court is not bound to surrender its jurisdiction upon a petition for removal until at least a petition is filed which, upon its face, shows the right of the petitioner to the transfer, it was not error for the court to retain these causes.' *Amory v. Amory*, 95 U. S. 186.

"In the very recent case of *Meyer v. Construction Co.*, 100 U. S. 457, a defendant in an inferior court of the State of Iowa filed a petition under the act of Congress of March 3, 1875, for a removal of the cause into the Circuit Court of the United States. The State court refused the petition because one of the two sureties on the bond offered was an attorney of the court, who was forbidden by the law and practice of Iowa to be a surety, and because the petition was filed too late, after the trial had begun. The defendant, notwithstanding, obtained from the clerk a copy of the record, and filed it in the Circuit Court of the United States; and that court overruled a motion of the plaintiff to remand the cause. The State court, against the protest of the defendant, proceeded with the cause, and entered a final decree for the plaintiff, and the defendant appealed therefrom to the Supreme Court of the State which affirmed that decree. The cause also proceeded in the Circuit Court of the United States and there resulted in a decree for the defendant. The matter was brought before the Supreme Court of the United States by writ of error to the State court and by appeal from the decree of the federal court. The Supreme Court of the United States held that the cause was legally removed because one of the sureties was admitted to be sufficient, and the act of Congress did not require more than one; and because, upon the acts appearing on the record, the trial had not begun when the petition for removal was filed; and that the defendant had not, by taking part under protest in the subsequent proceedings in the State court, waived his right to insist that the cause had been so removed.

"The Supreme Court, on the writ of error, reversed the judgment of the Supreme Court of Iowa and remanded the cause to that court, with instructions to reverse the decision of the inferior court of that State, and to direct that court to proceed no further with the suit; and on the appeal, reversed the decree of the Circuit Court of the United States upon its merits, and remanded the cause for further proceedings in that court. But no suggestion was made that the State court had no authority, for the purpose of ascertaining whether it should retain jurisdiction of the cause, to consider whether the provisions of the act of Congress had been complied with. On the contrary, the Chief-Justice, in delivering judgment, clearly implied that, if the sufficiency of the surety, or the citizenship of either party had been denied, in point of fact the State court might have inquired into it, and added: 'We fully recognize the principle heretofore asserted in many cases, that the State court is not required to let go its jurisdiction until a case is made which, upon its face, shows that the petitioner can remove the cause as a matter of right.'"

LECTURE LI.

The State Courts are not bound by the decisions of the Federal Courts as to Questions arising under the Local Law, and beyond the Scope of the Powers conferred on Congress. — Conflict of State and Federal Jurisdiction, and its Effect on the Administration of Justice. — Congress cannot regulate the purely Internal Commerce of a State, nor can they Modify or Repeal the Rules laid down by the State Courts with regard to Matters which are reserved to the States. — Power claimed and exercised by the Supreme Court of the United States under this head. — Does the Legislative Authority of the Federal Judiciary over Contracts extend beyond that of Congress? — There are in many States as to certain Subjects two different Rules: one followed by the State, the other by the Federal Courts; and the Result of the Cause depends on the Tribunal where the Suit is brought. — Is the Commercial Law of the Civilized Nations susceptible of being Reduced to a common Standard? — Authorities bearing on this point.

As the circle of federal authority widens, and each year increases the scope and number of the acts of Congress, the doctrine that if any point is within the grant of judicial power the entire case follows, will tend to diminish the importance of the State judiciary and throw an increasing amount of business into the courts of the United States. Whether such a result will conduce to the public good must obviously depend on the character and ability of the men who sit in the respective tribunals; and we may believe that if the States persist in choosing their judges for short terms of years by a popular vote, and the United States adhere to the Constitutional tenure of good behavior, an increasing preference will be shown for courts where the judiciary are raised above party prepossession and political influence.

Advantageous as our dual system may be in affording an opportunity for comparison and choice, it has some consequences that cannot be pronounced an unmixed good.

Co-ordinate tribunals, which have no common head, necessarily diverge, even when administering the laws of the same territory,—a truth amply verified by the course of American jurisprudence. Questions growing out of contracts made and to be performed in a State are decided by the national court of last resort not in accordance with the unwritten or customary law of the State where they originated, as expounded by its courts, but agreeably to some theoretic view of a general commercial law which does not exist, and is not to be found in the books.¹ The State courts, on the other hand, adhere to their own precedents, and do not consider themselves entitled to impair the obligations of contracts that have been made in reliance on the principles which they have laid down through a long series of years. The result is a conflict of jurisdiction which there are no means of allaying, because the Supreme Court of a State and the Supreme Court of the United States stand as to such matters on equal ground. Neither is under an obligation to regard the decisions of the other as authoritative; and as a writ of error will not lie on either side, both are as independent as if they were administering different systems of jurisprudence, and held their offices under governments having no common bond. Different rules of interpretation are consequently applied to the same contract by judges sitting in the same town, and the result of the suit will vary with the court in which it is instituted, or where the case is tried.²

¹ See *Swift v. Tyson*, 16 Peters, 1; *Carpenter v. Providence Insurance Co.*, Id. 495; *Miller v. Austin*, 13 Howard, 218; *Dred Scott Case*, 19 Id. 393, 603; *Watson v. Tarpley*, 18 Id. 521; *Oates v. National Bank*, 100 U. S. 245; *The Railroad Co. v. National Bank*, 102 U. S. 14; *McBride v. The Farmers' Bank*, 26 N. Y. 454; *Brooke v. New York R. R. Co.*, 108 Pa. 530, 535. See *ante*, p. 442.

² "The decisions of our court have been uniform since the time of *Coddington v. Bay*, 20 Johnson, 627, where it was determined that before the holder of a note can acquire a better title to it than the person from whom he received it, he must pay a present valuable consideration; and that receiving it in payment of an antecedent debt is not such a consideration. *Stalker v. McDonald*, 6 Hill, 93; *Youngs v. Lee*, 2 Kernan, 551. And we must follow these decisions, although they are in

Whether a recovery shall be had on a promissory note which has been taken as collateral security for an antecedent debt, against a maker from whom it was obtained by fraud, is thus made to turn in New York, Pennsylvania and Ohio, not on any settled rule, but on the tribunal by which the cause is heard; and if that is federal the plaintiff will prevail, if it is local the defendant.¹ Such a result tends to discredit the law, and shows, what might have been anticipated, that judicial legislation will rarely lead to beneficial results where co-ordinate tribunals are equally entitled to give the law, and the legislature is powerless to prescribe the rule, or to declare which of two discordant rules shall prevail. Agreeably to the general and well-settled doctrine, while the existence of a debt is a sufficient cause for the transfer of property as a means of security or payment, the creditor will not be a purchaser for value unless he enters into an agreement for forbearance, or changes his position for the worse in some other way.² There seems to be no reason why the negotiation of a note or bill should differ in this respect from other transfers, or confer a better title on the indorsee than that of the indorser. A consideration is necessary to the validity of a promissory note under the doctrines both of the commercial and common law, and if it is wanting between the original parties, a subsequent holder ought not to recover unless he gave or surrendered something in the belief that the note was good in the hands of the payee.³

Such was the generally received opinion at the beginning of this century, and down to a comparatively recent period.

conflict with that of the federal court in *Swift v. Tyson*." *McBride v. The Farmers' Bank*, 26 N. Y. 450, 454. See *Brooke v. New York, Lake Erie, & Western R. R. Co.*, 108 Pa. 530.

¹ *The Railroad Co. v. The National Bank*, 102 U. S. 29. See *ante*, 442.

² *Morse v. Godfrey*, 3 Story, 364; *Petrie v. Clark*, 11 S. & R. 377; *Garrard v. The Railroad Co.*, 29 Pa. St. 154, 160; *Ashton's App.*, 73 Pa. 153, 163; 2 Lead. Cas. in Eq. (4th Am ed.) 83.

³ 2 Am. Lead. Cas. (5th ed.) 227.

It still prevails in the courts of last resort of the most populous and commercial States of the American Union; and judging from the decision of the House of Lords in *Currie v. Misa*,¹ has undergone little change in England.² There was, nevertheless, an increasing tendency to regard negotiable instruments as being what Lord Mansfield had declared of Bank of England notes,³—not merely contracts, but money, and like it capable of passing from hand to hand, and becoming the property of any man who took them in good faith, however gross the misconduct of the person who made the transfer. Such virtually was the view taken by Story, J., in *Swift v. Tyson*,⁴ and it was adopted in Massachusetts and Connecticut, and measurably in Vermont. It followed that if a note which had been obtained feloniously, or by fraud, was endorsed as a security for a debt, the creditor might not only withhold it from the rightful owner, but if the latter's name appeared on the paper as drawer or endorser compel him to pay the amount in full by suit.

The change, which seems to have originated in the *dicta* of Mr. Justice Story, was regarded as an innovation in New York and Pennsylvania, where the courts stood fast in the ancient ways. It can scarcely be said to have been made in *Swift v. Tyson*, because the note was taken in payment, and the extinguishment of one demand is a valuable consideration for the creation of another; and the Supreme Court was almost as tardy in following the line marked out for the negotiation of bills and notes, as they were in accepting the extension given to admiralty jurisdiction in *De Lovio v. Boit*.⁵ In *Goodman v. Simonds*,⁶ and recently in *Oates v. The Na-*

¹ L. R. 1 App. 554, 565.

² See *De la Chaumette v. Bank of England*, 29 B. & C. 208; *Keene v. Beard*, 8 C. B. (N. S.) 381; *Byles on Bills* (10 ed.), 39; *Lennard's App.*, 2 C. R. 840, 843, and the able dissenting opinion of Lord Coleridge in *Currie v. Misa*, L. R. 10 Ex. 153, 165, for the effect of the opposite doctrine in facilitating fraud and breaches of trust.

³ See *Miller v. Rice*, 1 Burrow, 452.

⁴ 16 Peters, 1.

⁵ See *ante*, p. 1006.

⁶ 20 Howard, 343. That such was the *ratio decidendi* in *Goodman v. Simonds* is shown by the following extract from the judgment:—

tional Bank,¹ the decision was based on the existence of an agreement for forbearance; but when the point arose in *The Railroad Co. v. The National Bank*,² taking a promissory note as security for a pre-existing debt was held to be a purchase for value, contrary to a long line of precedents in New York, where the instrument was made and negotiated. The court treated these decisions as merely evidence, and not the law, and turned for proof to Daniel on Negotiable Instruments, Story on Promissory Notes, and Parsons on Notes and Bills, and the decisions collated by these authors from various quarters, which can hardly weigh in the scale, as regards the *lex loci contractus*, with judgments delivered nearer home.

The reason given was that the law of contracts, including guaranties, policies of insurance, bills of lading, and sales of chattels, as well as negotiable instruments,³ is a part of the general commercial law, and depends, not on the customary law of the locality, but on general principles gathered from writers on jurisprudence, and decisions in every part of the civilized world. Looking at the question in this aspect, it might seem that the opinions of Kent, Walworth, and other eminent men who have filled the bench in New York, are entitled to as much weight — considered merely as jurists,

“When the settlement was made the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitely fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already over due, and a forbearance to enforce remedies for its recovery; and the implication is very strong that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor; it constitutes one of the oldest titles of the law, under the head of Forbearance, and has always been considered a sufficient and valid consideration. *Elting v. Vanderlyn*, 4 John. 237; *Morton v. Burn*, 7 Ad. & El. 19; *Baker v. Walker*, 14 M. & W. 465; *Jennison v. Stafford*, 1 Cush. 168; *Walton v. Mascall*, 13 M. & W. 453; Com. Dig. Act Assumpsit, B. 1; *Wheeler v. Slocumb*, 16 Pick. 52; Story on Promissory Notes, sect. 168.”

¹ 100 U. S. 239.

² 102 U. S. 14.

³ *Carpenter v. The Providence Ins. Co.*, 16 Peters, 495.

aside from their judicial position — as any of the writers who have adopted the opposite view. Such was not the view of the Supreme Court which declared, in entering judgment, that —

“the transfer, before maturity, of negotiable paper as security for an antecedent debt merely, without other circumstances, if the paper be so indorsed that the holder becomes a party to the instrument, although the transfer is without express agreement by the creditor for indulgence, is not an improper use of such paper, and is as much in the usual course of commercial business as its transfer in payment of such debt. In either case, the *bona fide* holder is unaffected by equities or defences between prior parties, of which he had no notice. This conclusion is abundantly sustained by authority. A different determination by this court would, we apprehend, greatly surprise both the legal profession and the commercial world.¹ It is undoubtedly true that if we should apply to this case the principles announced in the highest court of the State of New York, a different conclusion would have been reached from that already announced. That learned court has held that the holder of negotiable paper transferred merely as collateral security for an antecedent debt, nothing more, and is not a holder for value within those rules of commercial law which protect such paper against the equities of prior parties.”

The authorities hardly bear out these remarks. They are, as we have seen, divided, and may be thought to incline against the conclusion which was treated as indubitable. In *Currie v. Misa*,² the Exchequer Chamber held that a pre-existing debt is a valuable consideration for the transfer of a check; but their view was laid aside in the House of Lords, and the judgment affirmed on the ground that the creditor not only forbore to press the debtor, but surrendered

¹ “See Bigelow’s Bills and Notes, 502 *et seq.*; 1 Daniel, Negotiable Instruments (2d ed.), ch. 25, sects. 820–833; Story, Promissory Notes, sects. 186, 195 (7th ed.), by Thorndyke; 1 Parsons, Notes and Bills (2d ed.), 218, sect. 4, ch. 6; and Redfield and Bigelow’s Leading Cases upon Bills of Exchange and Promissory Notes, where the authorities are cited by the authors.”

² L. R. 10 Ex. 153, 165; *Misa v. Currie*, L. R. 1 App. 454, 565.

a security which he had deposited and which was entered to his credit. Had the judgment in the *New York Bank v. The Brooklyn R. R. Co.* adhered to the doctrine of *Coddington v. Bay*, the decision would not have excited so much surprise in New York, Pennsylvania, or Ohio, nor, as we may believe, in the greatest commercial centre, London, as was naturally felt on learning that the authorities in those States would thenceforth count for naught in the federal courts where contracts were concerned, if the Supreme Court of the United States thought they were not in accordance with the general commercial law, as ascertained from other sources.

The ground taken by the Supreme Court in deciding that the judgments of the State courts may be overruled, as regards contracts made in the course of local and internal commerce, was stated by Mr. Justice Story in *Swift v. Tyson*, and if it is fallacious the inference must fail: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*,¹ to be in a great measure not the law of a single country only, but of the commercial world,—‘Non erit alia lex Romae alia Athenis, alia nunc alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.’”² The testimony of the noble passage cited from the “*De Republica*” to the universality of the principles of ethics will be generally accepted; but it is not necessarily a safe guide in the administration of law. As Lord Mansfield observed in *Moss v. Gallimore*,³ few things are more apt to confound than a simile; and care is certainly requisite in reasoning from a supposed analogy. The commercial law may be defined as the rules which govern traffic,—the sale and exchange of commodities, including the contracts which directly or indirectly minister to such ends. That these vary from age to age is undeniable, and would appear from the decisions on the negotiation of promissory notes if there were no other

¹ 2 Burr. R. 883, 887.

² *Swift v. Tyson*, 16 Peters, 19.

³ 1 Douglas, 279.

proof. The alteration is not arbitrary, but depends on a change of circumstances, which may occur in passing from country to country not less than in descending the stream of time. If the civil law as modified in France differs from the rule which prevailed under the Antonines, in holding that the right of property passes on the completion of the contract of sale, it is because trade as now conducted requires that the buyer may become the owner as soon as the parties have agreed on the thing and price, without waiting for delivery. The English law is analogous in this regard to that of France, while the rule in Scotland is nearly the same as it was at Rome. So a consideration is essential to the obligation of a parol contract in England, but may be dispensed with in France and generally on the continent of Europe. Hence, while the loss of the subject-matter of an executory contract for the sale of a specific chattel, before delivery, discharges the purchaser, at common law, on the ground of failure of consideration, no such result follows under the civil law, which holds him answerable for the price, unless the loss occurred through the vendor's fault.¹

A parol promise to give a purchaser the refusal of a house or chattel — that is, time to consider whether he will buy at the price named — is for a like reason nugatory under the English law, though binding in France, Scotland, and Holland;² but may, however, be rendered obligatory by affixing a seal, — a form unknown except among the English-speaking races.³ So the common and civil law are governed, as regards the sale of chattels, by the opposite maxims *caveat emptor* and *caveat venditor*,⁴ while the vendor's liability for the failure of the goods in kind and quality is measured by rules which are sometimes applied differently in England and the

¹ Benjamin on Sales, sect. 410; Hare on Contracts, 634, 635.

² *Cooke v. Oxley*, 3 Term, 653; *Payne v. Cave*, Id. 146; *Fisher v. Seltzer*, 23 Penn. 308; *Boston & Maine R. R. Co. v. Bradley*, 2 Cushing, 539; Hare on Contracts, 310, 342.

³ See *Calvert v. Gordon*, 3 M. & R. 124; 2 Simons, 253, 257; Hare on Contracts, 312; 4 Russell, 581; *Offord v. Davies*, 12 C. B. (n. s.) 748.

⁴ *Hargous v. Stone*, 5 N. Y. 378.

United States, and not always the same in principle. I may add that the doctrine of the federal courts, that a guaranty of future advances to a third person does not, even when under seal, become obligatory on compliance with its terms,¹ seems to be without foundation in the common law, and has brought the English and American courts into variance where they previously agreed.² It is rejected in many of the States which adhere to the English law,³ and indicates how vain is the endeavor to reduce the commercial law to a common or universal rule.

Joint contractors are each liable at common law for the entire fulfilment of the contract, but the obligation is limited by the civil law to their respective shares, unless the thing to be done or rendered is indivisible; and a promise by two persons to pay one hundred dollars, and a promise by each to pay fifty, come to the same thing.⁴ Such, at least, is the case as regards ordinary obligations, though contracts among merchants follow the English rule. An offer made through the mail cannot be accepted agreeably to the civil law after the offerer has posted a retraction; but such an acceptance may be valid in England and the United States, although the letter never reaches the person to whom it is addressed.⁵ On the other hand, while the principal's death is an instantaneous revocation at common law, even as regards contracts made by the agent in ignorance of the event, no such effect will be produced under the civil law until the

¹ *Douglass v. Reynolds*, 7 Peters, 113; *Arthur v. Morgan*, 112 Id. 497; *Davis v. Wells*, 104 U. S. 159; *Davis Sewing Machine Co. v. Richards*, 115 Id. 524.

² *Douglass v. Howland*, 24 Wend. 35; *Powers v. Bumcratz*, 12 Ohio St. 273.

³ *Union Bank v. Coster*, 3 N. Y. 203; *Farmers' Bank v. Kercheval*, 2 Mich. 504; *Nabb v. Koontz*, 17 Md. 283. See Hare on Contracts, 323, 326.

⁴ *Fremery, Études de droit Commercial*, ch. 113, pp. 25, 27; Hare on Contracts, 115.

⁵ *Pothier, Contrat de Vente*, No. 32; *Adams v. Lindsell*, 1 B. & Ald. 681; *Benjamin on Sales*, sect. 72.

death is communicated to the agent.¹ Lord Mansfield's *dictum* in *Luke v. Lyde* was uttered in treating of *pro rata* freight; and nowhere should greater regard be had to general, as distinguished from local, jurisprudence than in the consideration of questions arising under the maritime law, including marine insurance. Yet even here the differences are so great that the authorities of one State may be a misleading guide in another.² What constitutes a total loss and will justify an abandonment is tested by different rules in France, in England, and in the United States; and so of the right of the master to sell the vessel.³

The insurers are answerable in England and in this country whenever the loss is proximately caused by a peril enumerated in the policy, although the negligence of the master or mariners was a conducive cause which brought the vessel within the grasp of the peril; but a recovery cannot be had under the French law for losses which can be traced back to the fault of the master, — as when he lingers in port unjustifiably, and the ship is wrecked by a storm which she would have escaped by sailing at the proper time, or a fire is due to his neglect or incompetence.⁴

¹ *Hunt v. Rousmanier*, 8 Wheaton, 174; *Galt v. Galloway*, 4 Peters, 333; *Smout v. Ilbery*, 10 M. & W. 61; *Campanari v. Woodburn*, 15 C. B. (o. s.) 400; *Michigan State Bank v. Leavenworth*, 2 Williams (Vt.), 209; *Benjamin on Sales*, sects. 72, 73; *Hare on Contracts*, 95, 374. See *Ish v. Crane*, 8 Ohio St. 521.

² See *Ryder v. The Phoenix Ins. Co.*, 98 Mass. 185; *Patapsco Ins. Co. v. Coulter*, 3 Peters, 222; *The Columbia Ins. Co. v. Lawrence*, 10 Id. 507, 517; *Grim v. The Phoenix Ins. Co.*, 13 Johnson, 457; *Busk v. The Royal Ins. Co.*, 2 B. & Ald. 73; *Walker v. Maitland*, 5 Id. 171; *Patterson v. Ritchie*, 4 M. & S. 393.

³ See *Farnworth v. Hyde*, L. R. 2 C. P. 204, 225; *Moss v. Smith*, 9 C. B. 94; *Philpott v. Swann*, 11 C. B. (N. S.) 270; *Kemp v. Halliday*, L. R. 1 Q. B. 520; *American Ins. Co. v. Ogden*, 20 Wend. 287, 300; *Peters v. Phoenix Ins. Co.*, 3 S. R. 25; *Smith v. Bell*, 2 Caines' Cases in Error, 153; *Peele v. The Merchants' Ins. Co.*, 3 Mason, 27; *The Columbian Ins. Co. v. Ashby*, 4 Peters, 139; *Bradlie v. The Maryland Ins. Co.*, 12 Id. 378; *Peele v. The Suffolk Ins. Co.*, 7 Pick. 254; *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191; 1 Metcalf, 160; *Wood v. Lincoln & Kennebec Ins. Co.*, 6 Mass. 479; 2 Am. Leading Cases (5th ed.), 682, 702.

⁴ See *Pardessus Droit Commercial*, No. 771; *Pothier, Contrat de*

If the French and English courts arrive practically at the same results in such cases, under the ordinary form of policy, it is because barratry is construed as including negligence by the former tribunals, though not by the latter.

The enumeration might be carried further, but enough has, perhaps, been said to show that no uniform rule can be deduced from the decisions of the English and American courts under the commercial law, and that the certainty requisite to justice can be obtained only by following the local tribunals as regards the contracts made in each locality.

The several States of this country are collectively one nation, but they are as self-governing in all that concerns their purely internal commerce as if the General Government did not exist; and when the will of the people of New York or Pennsylvania is declared on such matters, through their representatives in the local legislatures, expressly or by long-continued acquiescence in the rules enunciated by their judges, it cannot be set aside by Congress short of an amendment of the Constitution.¹ Had the New York legislature declared that notes made and negotiated in that State should follow the rule laid down in *Bay v. Coddington*, the federal tribunals would have been bound to carry it into effect, notwithstanding any attempt of the national legislature to introduce a different principle; and it is inconceivable that the judicial department of the government can exercise a greater authority in this regard than the legislative. Whether the temptation to fraud and breaches of trust arising from the ruin caused by the gambling contracts, which enrich the few at the expense of the many, will be dangerously increased by holding that a thief or swindler can confer a valid title to a coupon bond or bill payable to bearer by handing it over as security to a creditor, who gives nothing in return,

Louage Maritime, sect. 2, no. 213; *Valin*, liv. 3, tit. 6, art. 27; *Emerigon*, ch. 12, sect. 3; *Walker v. Maitland*, 5 B. & Ald. 171; *Redman v. Wilson*, 14 M. & W. 476; *Thompson v. Hopper*, 1 E. & B. & E. 1038; *The Patapsco Ins. Co. v. Coulter*, 3 Peters, 222; 2 Am. Lead. Cas. (5th ed.) 779; *American Ins. Co. v. Insley*, 7 Penn. 223.

¹ See *ante*, pp. 439, 442.

and naturally refrains from asking questions that might lead to a discovery of the fraud, depends on circumstances which are not necessarily the same in every part of a country so extensive and various as the United States. The question should, therefore, be left to the people of the several States as best able to determine what their respective needs require in matters that do not concern the nation as a whole.

There is another view which should not be omitted. If the judgments of the State courts are simply evidence and not the law, they may still, when handed down in an unbroken chain for twenty years, with the acquiescence of the legislature and the community, amount to a demonstration, and establish the law on a basis which no power that is not legislative can disturb. This is universally admitted as regards the title to real estate, and it is not easy to discern any real distinction between such cases and those where a chattel or a chose in action is concerned. If the decisions of the State courts are conclusive as to what will discharge antecedent equities in the case of land, chattels, or non-negotiable contracts, they should be equally conclusive when a like question arises out of a transfer of a bill of exchange or municipal bond. Conceding, what no one who is acquainted with the subject will readily allow, that Chancellor Kent and the Court of Appeals mistook the law in *Bay v. Coddington*, and that their judgment might have been disregarded by the federal courts when originally pronounced, it does not follow that such a course can properly be adopted now that those judgments have been tested by the experience of great commercial centres, and ratified by the popular will, as indicated by the failure of the legislature to lay down a different rule. Above all, they ought not to be set aside as regards contracts which have been made in reliance on the principles therein enunciated, and with the belief that these are too well settled to be changed. The Supreme Court of the United States holds that the State courts cannot deviate consistently with the Constitution from the line of precedent as regards intervening contracts where the operation of a statute is concerned; and as the

principle is the same wherever agreements are entered into, or rights acquired on the faith of the judgment of a court of last resort, it ought not to be disregarded by the federal tribunals in administering the laws of the several States.¹

The case of *The Manhattan Life Insurance Co. v. Broughton*² affords a painful instance of a state of things which is hardly creditable to American jurisprudence. It arose out of a life insurance effected by a citizen of New York in a New York company, payable to his wife. He became insane and killed himself, and an action was brought by her trustee. Agreeably to the *lex loci contractus*, such a death was a violation of a condition in the policy that the insured shall not die by his own hand; and the plaintiff was nonsuited. This seemingly should have been the end of the case, because it depended solely on the law of New York, and both parties were citizens of that State. A citizen of New Jersey was, however, substituted as trustee, who brought a suit on the policy in the Circuit Court of the United States, and obtained a judgment which was sustained by the Supreme Court at Washington. The contract was confessedly governed by the State law; but the view taken by the federal courts differed so widely from the rule laid down by the State tribunals as to show that contradictory rules prevail in New York, each claiming to be the law. Such a result makes the administration of justice a game, where the event depends on the skill of the players, and not on fundamental principles. The contract was made on the faith of the New York decisions, and the insurers were entitled to believe that the rule would not be changed retroactively to their prejudice.³

¹ See *ante*, pp. 725, 727; *Sears v. Cottrell*, 5 Mich. 251; *State v. Allen*, 2 McCord, 56.

² 109 U. S. 121.

³ See *ante*, p. 722.

LECTURE LII.

The United States have no general or common-law Authority to punish Crime; and their Criminal Jurisdiction is confined to the offences enumerated in the Constitution; to Violations of such "necessary and proper laws" as are made by Congress, and to Acts done in the Territories and such places as have been ceded by the States. — In England Treason is an Offence against the Person or Sovereignty of the King, and may consist in a Conspiracy which is not carried into effect. — It consists under our Constitution in levying War against the United States or giving Aid and Comfort to their Enemies. A Plot to subvert the Government or the Assassination of the President is not treason, but may be visited with Death or such other Penalties as may be prescribed by Congress. — The Law of Nations requires every Government to use Diligence to prevent Acts that are of a nature to injure other Nations with which it is at peace. — Counterfeiting the Money or Securities of a Foreign Country, or manufacturing Spurious Notes or Coin with an Intent to circulate them abroad is an Offence within this Principle. — Piracy is Robbery or other act done feloniously on the High Seas, contrary to International Law.

THE police power to repress acts that are prejudicial to society or to individuals was not, save exceptionally, delegated to the General Government, and remains in the States.¹ Although they are forbidden by the Fourteenth Amendment to authorize or sanction any act which operates as a deprivation of life, liberty, or property, — and Congress are empowered to enforce the prohibition, — the criminal jurisdiction of the United States is not thereby enlarged, nor does it acquire the right to legislate for, or inflict penalties on, individuals.² The United States consequently have no general

¹ *Ex parte Bollman*, 4 Cranch, 75; *United States v. Coolidge*, 1 Wheaton, 415; *Cohen v. Virginia*, 6 Id. 264, 426; *United States v. Cruikshank*, 92 U. S. 542; *Civil Rights Cases*, 109 Id. 315.

² *Civil Service Cases*, 109 U. S. 3. See *ante*, pp. 524, 533.

or common-law power to punish crime, and their authority in this regard is confined to the following heads: (1) the express power conferred by the Constitution in certain enumerated instances; (2) the implied authority resulting from the power to make all necessary and proper laws, and consequently to punish every person by whom such laws are broken;¹ (3) the power to exercise criminal as well as civil jurisdiction over the Territories, and in such localities as have been ceded by the States to the United States.²

For like reasons the federal courts cannot take cognizance of any act as criminal which has not been declared criminal by Congress; and Congress cannot declare any act criminal unless it is contrary to some law made, or duty imposed, in pursuance of the powers conferred on the General Government.³ But all laws, rights, and duties within the scope of the civil powers of the United States may be enforced by penal legislation, and punishment inflicted for their violation.⁴

As the law now stands, the criminal jurisdiction of the State and of the federal courts is severally exclusive, and neither can intrude on the domain of the other. If an offence is indictable in the State courts, an indictment will not lie for the same offence in the federal courts, and so, conversely, of offences cognizable in the last-named tribunals. But it is also true that as both governments are entitled to obedience, the same act may be punishable by both. An assault and battery is a breach of the peace of the State where the act is done, and punishable as such only by her

¹ See *ante*, p. 116; *Ex parte Yarbrough*, 110 U. S. 651; *Legal Tender Cases*, 12 Wallace, 536.

² *The United States v. Connell*, 2 Mason, 60; *Fort Leavenworth v. Lowe*, 114 U. S. 525, 533; *Cohen v. Virginia*, 6 Wheaton, 264, 426.

³ *United States v. DeWitt*, 9 Wallace, 41; *United States v. Fox*, 95 U. S. 670; *United States v. Reese*, 92 Id. 214; *United States v. Cruikshank*, Id. 542; *Baldwin v. Franks*, 120 Id. 678; see *ante*, pp. 522, 533. See *Patterson's Federal Restraints on State Action*, p. 200.

⁴ *United States v. Gleason*, 1 Woolworth, 128; *Scott v. United States*, 3 Wallace, 642; *United States v. Fox*, 95 U. S. 670; *Ex parte Yarbrough*, 110 Id. 651, 658.

courts, whether the person assailed was or was not in the service of the United States. But if such was his official character, and he was hindered in the performance of his duty, the laws of the Union are violated as well as the laws of the State, and a conviction or acquittal in the courts of one government will not shield him from punishment by the other.¹

Another qualification has been ingrafted on the Constitution, — that when a defence to a prosecution in a local court depends on the Constitution or an authority conferred by Congress, the indictment may be removed to the Circuit Court of the United States for the proper district, and the guilt or innocence of the accused determined, with a due regard to the laws of both governments.² Such a case may arise out of a homicide by the marshal in executing the process of a federal court, or a duty imposed by an order from the President, or an act of Congress.

The express power of Congress to legislate for the punishment of crime is confined within narrow limits. By Article I., Section 8, Congress are empowered to provide for the punishment of counterfeiting the securities and current coin of the United States, and also to define and punish piracies and felonies on the high seas, and offences against the law of nations. In Article III., Section 3, which relates principally to the Judiciary, it is provided that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. By the second section of the same article, Congress have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person so attainted.

In considering these provisions we may begin with that relating to the offence of treason. The gravamen of this crime is the injury done to the welfare of society by sub-

¹ *Moore v. Illinois*, 14 Howard, 18; *Scott v. United States*, 3 Wallace, 842; *Ex parte Yarbrough*, 110 U. S. 651, 659.

² *Tennessee v. Davis*, 100 U. S. 257. See *post*, p. 1154; *Bush v. Ray*, 107 U. S. 110.

verting the frame of government on which the maintenance of social order depends. And as the evil resulting from this cause may spread farther, and have more enduring consequences than can well arise from a wrong done to an individual, so treason is the gravest offence known to the law, and one meriting condign punishment. There may be instances where resistance to bad and oppressive government is dictated by patriotism and approved by morals; but this is a distinction which municipal law obviously cannot recognize.

Where government is personal there can be no practical distinction between the sovereign and the State; and an assault on the one must necessarily be attended with danger or injury to the other. Everything wilfully done or attempted whereby the king's life may be endangered — as, for instance, conspiring to seize or imprison the king, or assembling company with that intent — is treasonable. It is an old saying that the way is brief from the prison of a sovereign to his grave; and revolutions beginning with professions of respect to the monarch have not unfrequently ended in his exile or death. Moreover, in a monarchy the king is the pivot or keystone of the State, and his person cannot be restrained or injured without disturbing the whole fabric of society.¹ This was peculiarly true under the feudal system, which summed up all the duties of the subject in allegiance to the crown. Accordingly treason, under the law of England as defined in the statute 25 Edward III., chap. 3, 22, was an offence done to the dignity, the life, or the honor of the king. To compass his death, that of the queen, or of their son and heir; to violate the king's companion, or the king's eldest daughter, unmarried, or the wife of the king's eldest son and heir; to levy war against the king, or to adhere to his enemies, giving them aid and comfort; to counterfeit the king's great or privy seal, to counterfeit the king's money, or to bring false money into the realm counterfeit to that of England; and finally, to slay the chancellor, treasurer, or king's justices of either bench, or other justices

¹ See Hallam's Constitutional History, vol. iii. chap. xv. p. 152.

assigned to hear and determine, being in their places doing their office, — were all felonies rising to the grade of treason, as defined by the statute of Edward III. In some of these instances the injury to the king, considered merely as an individual, might seem too slight to merit so severe a penalty; but there was in all of them an actual or possible injury to the public which it was incumbent on government to repress. To counterfeit the current coin of the realm was not merely to diminish the revenue of the mint, it tended to create uncertainty and confusion in all commercial transactions throughout the kingdom. The seduction of the king's wife, of his eldest daughter, or of the wife of his eldest son, might entail the consequences of a disputed succession. Levying war against the king, or by overt means compassing his death, meant nothing less than the overthrow of the government, and the loss of the security which it gave to life and person. In these and other cases of a like kind the law might well show itself jealous of attempts which, though nominally directed against an individual, really jeopardized the safety of the community.

The incongruous classification of the statute of Edward II. was superseded in the beginning of this century by the act of 57 George III., chap. 7, which carries out the same general design by providing that —

“if any person or persons during the life of the King, and until the end of the next session of Parliament after a demise of the Crown, shall, within the realm or without, compass, imagine, invent, devise, or intend the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding, imprisonment or restraint, of the person of the same our Sovereign Lord the King, his heirs and successors, or to deprive or depose him or them from the style, honour, or kingly name of the imperial crown of this realm, or of any of his Majesty's dominions or countries, or to levy war against his Majesty, his heirs and successors, within this realm, in order by force or constraint to compel him or them to change his or their measures or counsels, or in order to put any force or constraint upon, or to intimidate or overawe both houses or either house of Parliament, or to move or stir any for-

eigner or stranger with force to invade this realm, or any of his Majesty's dominions or countries under the obeisance of his Majesty, his heirs and successors; and such compassings, imaginations, inventions, devices, and intentions, or any of them, shall express, utter, or declare, by publishing any printing or writing, or by any overt act or deed, — being legally convicted thereof upon the oaths of two lawful and credible witnesses shall be adjudged a traitor, and suffer as in cases of high treason."¹

Treason, as known to the common law and under the above-cited statutes, necessarily ceased to exist on the Declaration of Independence; and the United States as constituted under the Articles of Confederation, had no criminal jurisdiction. War might, consequently, have been levied with impunity by a citizen against the federal government, except so far as it was punishable under the statutes of the several States. And it was not until the adoption of the Constitution, in 1789, that the people of the United States acquired the power to protect themselves against treasonable attempts to subvert the government which they had established.²

In passing from a monarchy to a republic, the question ceases to be complicated with merely personal considerations. The nation is no longer in leading-strings; it has come of age, and is in the full possession of the sovereignty formerly delegated to a king. There may be a chief-magistrate exercising the kingly function in a certain measure and for the time being; but he does not personify the State. The president of the United States has for some purposes more power than the king of England, and every good citizen should wish him well; but to kill him is simply murder, unless the crime is an act of war against the government. He is not encompassed by a triple hedge which it is death to break, or even to approach with a felonious attempt. He may sustain bodily injury from an assault, or be wounded where the family affections are most sensitive, and yet have

¹ Hallam, Constitutional History, vol. iii. chap. xv. p. 134.

² See *ante*, p. 66.

no other mode of vindication or redress than an indictment for an assault and battery, or an action on the case for damages. He is a private citizen in a public station, and must, as such, take his chance with the common herd. In an almost forgotten instance, where a gross personal indignity was offered to President Jackson, the only chastisement inflicted on the aggressor was a hearty blow from the cane of the outraged victor of New Orleans. In England an assault on the chief-magistrate endangers society, and the offence would deservedly have ranked as treason. But names cannot alter things. On the president more than on an English monarch may rest the responsibility of a great decision. His sense and manliness may stay, his want of energy and firmness precipitate, the tottering commonwealth. Do what we may, the office cannot be separated from the individual. If the death of Abraham Lincoln had occurred four years earlier, the course of history might have been changed. When he fell by the hand of an assassin it was thought necessary to suspend the safeguards afforded by the Constitution and the fundamental principles of the common law, by bringing the persons who were charged with being accomplices in the crime before a military commission, and sentencing them to death. What then occurred may be thought to indicate that the safety of the chief-magistrate demands stronger guarantees than that of an individual. There is a greater evil than punishing the innocent for the guilty,—that of punishing the guilty by arbitrary and illegal means, which lead to the belief that a wrong has been done to innocence.

The assassination of Mr. Garfield gave a further and painful proof of the necessity of protecting the president. The object of punishment is not vengeance, but to prevent the repetition of acts that are attended with injurious consequences to the community. And as a blow struck at the chief-magistrate is more far-reaching and hurtful in its effect than any which can be aimed at an individual, so it should be visited with a severer penalty. An assault on the president, with intent to kill or to inflict grievous bodily harm, should be declared treason, and made punishable with death,

as a means of warning ruffians like Guiteau that such acts are viewed with abhorrence by the American people.

A detailed examination of the law of treason would be out of place in this work. It may, under the Constitution, be committed in two ways: (1) by levying war against the United States; and (2) by adhering to the enemies of the United States, giving them aid and comfort. Merely assembling to plot an insurrection will not therefore constitute this crime, which, under our law, is limited to the overt acts of levying war against the United States, or giving aid and comfort to their enemies.¹ If, as the spread of secession indicates, this definition is not broad enough to give security against the plots which undermine and may end in subverting a government, the error is on the side of mercy. A concerted plan violently to dissolve the Union, or substitute a monarchy for the republic, would not therefore be punishable as treason under the Constitution, though manifested by an ordinance of secession or the election of an emperor. To constitute the crime there must be some act that can fairly be construed as war. This accentuates the difference between our law and that of England, where compassing the king's death is as much treason as if the design were carried into effect. When, however, an overt act is done which amounts to levying war, all who concur in it may be within the meaning of the Constitution, although no blow was struck and they were not actually present.² It was, however, decided in a case arising in the Circuit Court of Ohio that persons engaged in an insurrection against the government are not enemies in such a sense that giving them aid and comfort will be treasonable. This seems questionable when the insurrection has assumed the proportions of actual war; and is manifestly at variance with the judgment pronounced in the Prize Cases.³

¹ See Chief-Justice Marshall's opinion, as given in the Report of Burr's Trial, vol. ii. p. 426. Washington, 1803.

² *Ex parte Bollman*, 4 Cranch, 75; *Carlisle v. United States*, 16 Wallace, 147.

³ 2 Black, 687; *Mrs. Alexander's Cotton*, 2 Wallace, 404, 419.

It is not always easy to draw the line between a riot, or other aggravated breach of the peace, and actual treason. A conspiracy to rescue a prisoner, oppose the service of a writ, or prevent the law from being executed in a particular or single instance, is not treasonable under the law of the United States or that of England, although carried into effect by an armed array and with a preconcerted purpose. The government is not directly assailed, and if no injury ensues to life or property, the offence will simply be a misdemeanor. But when such acts are done in pursuance of a concerted design to procure the repeal of an obnoxious law by intimidation, or to prevent the officers of the government from carrying it into effect, war may properly be said to be levied against the United States, and the parties are chargeable with treason.¹ "If," said Patterson, J., in *The United States v. Mitchell*, "the object of the insurrection was to suppress the excise offices, and prevent the execution of an act of Congress by force and intimidation, the offence in legal estimation is a usurpation of the authority of government; it is high treason by levying war."²

It has been justly observed, "An intention to commit an offence however manifest, a contrivance however deliberate, an attempt however casually rendered abortive, differ widely from an accomplished crime, and are punishable under the common law with a lower penalty, or even none at all. Such a distinction is not equally applicable to the crime of treason where success may bring with it impunity, and free the offender from the penalty of the law. The jurisprudence of most countries, therefore, treats conspiracies against the sovereign power as rebellion, and punishable with death."³

The necessity for empowering government to punish machinations which threaten its existence was demonstrated by the conspiracy against the United States which led to seces-

¹ Hallam's Constitutional History, vol. ii. p. 156.

² *United States v. Mitchell*, 2 Dallas, 348; *United States v. Vigal*, Id. 346; *United States v. Hanwick*, 2 Wallace, Jr. 140.

³ Hallam's Constitutional History, vol. iii. chap. xv. p. 15.

sion and the Civil War. The plot broke into revolt in the beginning of 1861, and on July 31 of that year Congress made a law which was subsequently embodied in the Revised Statutes, section 5336. The act provides for the punishment of persons who conspire (1) "to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof;" or (2) "by force to prevent, hinder, or delay the execution of any law of the United States;" or (3) "by force to take or possess any property of the United States contrary to the authority thereof." In *Baldwin v. Franks*,¹ the defendant conspired with others to expel the Chinese residents and traders of the town of Nicholaus, in the State of California, and in pursuance of that design put them on board a steamboat, and by threats and violence drove them from the town and State. The court held that the defendant was not indictable under the act. To constitute a violation of its provisions "there must be something more than setting the laws at defiance. There must be a conspiracy" forcibly to resist the authority of the United States while carrying the law into execution. "The government must be opposed," as distinguished from an attempt to do the thing which it prohibits, or to frustrate the objects which it has legislatively endeavored to promote. The decision turned on the language of the statute; and the power of Congress to protect the persons and property of aliens by appropriate penal legislation is unquestionable.

No man can be guilty of treason by seeking to overthrow a government to which he is not bound, either permanently, as in the case of a natural-born citizen, or temporarily, as in that of a resident or denizen. But every one who comes into a country acquires a right to protection, implying a corresponding obligation, which cannot be violated without a crime. To seek to injure the land where we have taken shelter is therefore an offence which may be laid as treason in an indictment appropriately drawn. According to *Calvin's Case*,² the proper course under these circumstances was

¹ 120 U. S. 678, 692, 693, 702.

² 7 Coke, 6, b.

to aver that the accused had committed treason against "our lady the Queen," omitting these words, "his natural lady" (*naturalem dominam suam*), and concluding, "against his due allegiance."

It is not so easy to apply the converse of this principle. It was resolved in Calvin's Case that if alien enemies came into England and there took possession of a town or fortress, the authority of the Crown would be so far suspended within the conquered place that their children born therein would not owe allegiance to the king, or be natural-born subjects. For like reason the Supreme Court of the United States decided that goods imported from Canada into Eastport, Me., during the war of 1812, while that place was held by the British forces, did not owe duty to the government either at the time or subsequently, because the effect of the hostile occupation was to suspend the operation of the laws of the United States; and it may be contended that when a foreign or domestic enemy obtains actual possession of any portion of the soil of a country, to the exclusion of the rightful government, the latter cannot hold the inhabitants guilty of treason for yielding an enforced obedience.

On the occupation of any part of the United States by an invading or insurrectionary force, the inhabitants, agreeably to the decisions, are between the upper and nether millstones, and may not only be despoiled by the hostile power, but treated by their own government as the enemy whose subjects they have temporarily become, and denied the benefit of the municipal law. The goods of every man who resides in such a district may not only be captured as prize of war, but a libel may be filed and judgment entered by default against the personal property which he owns in the parts of the country which are in the undisturbed possession of the national forces, without inquiring into his loyalty, and whether he could and ought to have crossed the lines and escaped from the hostile territory.¹ And it would seem that

¹ Prize Cases, 2 Black, 635, 674; Mrs. Alexander's Cotton, 2 Wallace, 404, 419; Miller v. The United States, 11 Id. 268, 311. See *ante*, p. 1022.

a government cannot justly punish him as a traitor whom it is unable to protect, and treats as an enemy for not abandoning his family and home. No penalty will be incurred by submission to a hostile or usurping force which obtains possession of the entire country and establishes a government *de facto*; and the case is morally if not legally the same when a town or province falls into the hands of a foreign or domestic enemy who establishes a government of his own creation, although the rightful government may still continue to bear sway elsewhere. The better opinion, nevertheless, is that while such considerations may afford ground for a pardon, they do not constitute a defence that can be regarded by a court or jury.

The right to punish aliens for offences which would be felonious if committed by a citizen is subject to a limitation imposed by international law. For if the act is done on behalf of his own country, and adopted by it subsequently, and would be valid *jure belli* had war been declared, the ratification will operate as a command, and the injured party will thereupon be remitted by the public law to the remedy against the government which has assumed the responsibility.¹ Accordingly, when a steamer was burnt in a harbor of the State of New York by an English subject during an insurrection in Canada, on the allegation that she was conveying munitions of war to the insurgents, and the English government ratified the act, and insisted that the offender, who had been tried and convicted by the tribunals of the State, should be released, the New York tribunals refused to recognize the claim; and the controversy might have had serious consequences had not the jury rendered a verdict of acquittal on the ground that the evidence against the prisoner was his own assertion, which proved to be an empty boast.² Such a defence as that made in *The People v. McLeod* obviously would not avail a man who, after taking up his abode in a foreign country and becoming subject to its laws, should attempt while there to destroy its ships or

¹ *Buron v. Denman*, 2 Exchequer, 167. See *ante*, p. 915.

² *The People v. McLeod*, 25 Wend. 483; 5 Hill, 378.

dockyards, or do any other hostile act on behalf of his own sovereign, before or after a declaration of war.

"The law of nations" is a general term, comprising the principles governing the relations between sovereign States standing on an equal footing, and recognizing no common superior. It was therefore necessary that Congress should be authorized, not only to punish offences of this description, but to define wherein they consist. Laws protecting the persons of ambassadors, consuls, and other agents accredited by foreign governments to our own, fall within this power; and so do laws requiring citizens and all persons within the United States to observe the duty of neutrality towards foreign governments engaged in warfare with each other or with their own citizens. Congress may consequently forbid troops to be enlisted, or vessels equipped, in this country for the service of a belligerent. Criminal statutes for enforcing and preserving the neutral relations of the United States with other nations were passed by Congress at a very early date, and their constitutionality is indisputable.¹ The necessity for the exercise of such an authority is shown by the case of the "Alabama," which gave rise to a controversy between this country and England that, but for mutual forbearance, might have led to war.

There is another duty which every nation should observe, — to give the citizens and subjects of foreign governments a due measure of protection in the prosecution of commerce, and whenever they are, from any cause, within its territory; and as a failure in this regard may render the United States answerable and result in war, a State law or police regulation which operates arbitrarily and unjustly on immigrants may be set aside by the federal tribunals.² By a parity of reasoning Congress may, if the occasion requires it, provide for the repression or punishment of acts of lawless violence committed on the persons of foreigners who are temporarily within the limits of the United States.³

¹ United States v. Arjona, 120 U. S. 479, 488.

² Chy Lung v. Freeman, 92 U. S. 275. See *ante*, p. 472.

³ See Baldwin v. Franks, 120 U. S. 678, 692, 696, 702.

It is not necessary that Congress should, in exercising the power, declare that the offence in question is against the law of nations. Whether such is its character depends on the nature of the thing done, and not on any declaration that can be made by Congress.¹ If the act be in itself, or in its consequences, injurious to a people with whom we are at peace, or calculated to disturb the well-being of society in any quarter of the globe, it may be forbidden, and punishment inflicted on every one who breaks the rule. Counterfeiting the coins or securities of a foreign nation is punishable under this principle,² which also includes the heinous offences of manufacturing and shipping infernal machines or dynamite, with a view to their being employed in the destruction of property or life.

The law of nations requires every government to use due diligence to prevent a wrong being done to other nations with which it is at peace, or to their subjects. The right and duty of a country to punish persons who take advantage of the shelter which it affords to counterfeit the money of a foreign country have long been recognized, and may be enforced, although the offender does not intend to utter the spurious coin at home, and the obligation is simply one of comity and good faith. Foreign bills of exchange, bank-notes, and national and corporate bonds and securities have now become even more important as a means of international intercourse and commerce than coin; and as no government can effectually guard itself or its citizens from fraud or forgery beyond its own jurisdiction, it is the interest of every people to give other nations the protection in this regard which they may need in their turn. The act of May 16, 1834, provides for the punishment of forging or counterfeiting, within the United States, of any bonds or security of any foreign government, or any bank-note or bill issued by a foreign corporation and intended to circulate as money, or "having in possession any plate, or any part thereof," by

¹ The United States *v.* Arjona, 120 U. S. 479, 488.

² See The Emperor of Austria *v.* Day and Kossuth, 2 Giffard, 678; 3 De G. F. & J. 217.

which such a forgery may be committed. The defendant Arjona was convicted and sentenced under the above statute, and when the judgment came before the Supreme Court of the United States, it was sustained by Chief-Justice Waite in an able opinion covering the above grounds.¹

¹ The principles on which this decision rests were laid down in *The Emperor of Austria v. Day and Kossuth*, 2 Giffard, 678; 3 De G. F. & J. 217. The defendant Kossuth, a Hungarian refugee, caused a large quantity of notes to be manufactured in England, which, though not made in imitation of any notes circulating in Hungary, purported to be receivable as money in every Hungarian county and public pay office, and to be guaranteed by the State. The plaintiff, as king of Hungary, sued to have these notes delivered up, and to restrain the manufacture of others, alleging that the issue of such notes would injure the rights of the plaintiff by promoting revolution and disorder, would injure the State by the introduction of a spurious circulation, and would thereby also injure the plaintiff's subjects. What gave the case a distinctive character, and held the minds of the judges in suspense, was that the notes were not forgeries in the ordinary sense of the term, or made with the view of being uttered as the money then current in the Austrian empire, and were on the contrary intended in case a revolt occurred in Hungary to be issued by the insurgents as the currency of the revolutionary government which it was their object to establish. The vice-chancellor granted the injunction on the following grounds: "If the question related merely to an affair of State, it would be a question, not of law, but for mere political discussion. But the regulation of the coin and currency of every State is a great prerogative right of the sovereign power. It is not a mere municipal right, or a mere question of municipal law. Money is the medium of commerce between all civilized nations; therefore the prerogative of each sovereign State as to money is but a great public right, recognized and protected by the law of nations. A public right recognized by the law of nations is a legal right, because the law of nations is part of the common law of England. These propositions are supported by unquestionable authority. In the modern version of Blackstone's Commentaries (a) it is laid down (and it has always been held in our courts) that the law of nations, whenever any question arises which is properly the object of its jurisdiction, is adopted in its full extent by the common law of England, and held to be a part of the law of the land. Acts of Parliament, which have been from time to time made to enforce this universal law, or to facilitate the execution of its decisions, are not considered as introductive of any new rule, but merely declaratory of the old fundamental Constitution of the kingdom, without which it must cease to be part of the civilized world. To apply these acknowledged principles of the law of nations

Congress also have power to define and punish piracies and felonies on the high seas. A piracy is a felony committed on the ocean beyond the reach of any municipal jurisdiction; but every felony on the high seas is not necessarily piracy. A pirate has been said to be an enemy of mankind, acting without any national authority, and making war for

and law of England to the present case, it appears that the British Parliament, by the act 11 George IV. and 1 William IV., chap. 68, has enacted that the forgery or counterfeiting the paper money of any foreign sovereign or State is a felony punishable by the law of England. This statute is a legislative recognition of the general right of the sovereign authority in foreign States to the assistance of the laws of this country to protect their rights as to the regulation of their paper money as well as their coin, and to punish by the law of England offences against that power."

An appeal having been taken, the chancellor held that, although the court had not any jurisdiction to restrain the commission of acts which only violate the political privileges of a foreign sovereign, the manufacture of these notes ought to be restrained, because they were intended to further a hostile design against a nation with which the English government was at peace, by means calculated to disorder trade, and be injurious to individuals as well as the State. A wrong done by an English subject, unauthorized by the English government, in respect of property belonging to a foreign sovereign, either in his individual or his corporate capacity, or to his subjects, might be redressed by the English courts; and the circulation of spurious notes purporting to be guaranteed by the nation which he represented was such a wrong.

Lord Campbell said, in giving judgment: "If the vice-chancellor's decree is affirmed, there is no danger of this country losing the credit which it has long enjoyed of being the asylum for those who from persecution or revolution have been driven from their native homes. They enjoy this asylum on the condition that while resident in England they enter into no conspiracies or plots against existing governments in foreign States, which would be an infraction of our municipal law by native-born subjects. Fitting out an expedition in England to bring about a revolution in the dominions of a sovereign in alliance with Queen Victoria would certainly amount to a misdemeanor, be the confederates native-born subjects or aliens; and the manufacture of twenty tons of promissory notes for the same purpose may amount to the same offence. Therefore I can consider M. Kossuth no more an object of pity if by an injunction he receives a check in this enterprise than the Emperor Louis Napoleon would have been if by a criminal prosecution he had been stopped in his enterprise when he was about to sail from the Thames for Boulogne with a view to dethrone Louis Philippe."

his own account in defiance of law. Any hostile aggression, or violent invasion of right, committed under these circumstances will therefore be piracy if so defined by Congress. In the exercise of this power the law may speak generally, or use precise language ; and in the United States *v. Smith*,¹ a statute providing for the punishment of any person who might commit the crime of piracy, as defined by the law of nations, was held a legitimate exercise of the power of Congress.

Mr. Webster, of counsel for the prisoner, contended that the act of March 3, 1819, by which Congress had provided for the punishment of any person who should commit the offence of piracy as defined by the law of nations, was not a legitimate exercise of the power of Congress. There was much vagueness and uncertainty as to what constituted piracy *jure gentium*. In giving the power to define, the Constitution must be presumed to have intended that it should be so exercised as to leave no doubt of the precise nature and limit of the crime. Instead of performing this duty Congress had used the most general terms, and left the task of interpretation to the judiciary. The court held that there was nothing in the language of the Constitution to preclude Congress, in prescribing the penalty for piracy, from designating the offence, as was customary in the case of other crimes, by the words in common use, and allowing the courts to declare what acts were within the meaning of the terms employed. If a definition was necessary it might be given by reference as well as by an enumeration of particulars. That is certain which can be ascertained ; and the reference given by Congress was sufficiently clear to furnish a guide for the court and prevent the decision from being merely arbitrary. Piracy, agreeably to the law of nations, is robbery on the high seas.

Although this definition is generally accepted it would seem to be too narrow in making the character of the offence depend on the purpose of the aggressor in the particular in-

¹ 5 Wheaton, 153.

stance, rather than on the circumstances and the effect which his act is calculated to produce. Murder on the high seas, or the capture of a vessel, may, in common with some other acts of violence, be piracy, although not done *animo furandi*.¹ No doubt plunder is the object which pirates generally have in view; but this element is not necessary to constitute the crime. Piracy is war waged feloniously without any authority that can be recognized by the law of nations; and an injury to life or property which would be an act of war between independent States may be piratical if committed with a criminal design by persons navigating the seas on their own account as enemies of mankind, although the motive is lust or vengeance.²

A ratification by a duly constituted government may, under the authority of *Buron v. Denman*,³ have the effect of a command, in purging the private wrong and remitting the injured parties to their remedy under the public law against the country which has assumed the responsibility of the outrage. A capture made in good faith *jure belli*, under a commission granted by rebels or insurgents having no proper or duly constituted national authority, is not necessarily piracy.⁴ But the case is obviously different where there is not only a want of authority, but the consciousness of a criminal design; and in the *United States v. Klintock*, the accused was convicted of piracy for the felonious capture of a neutral vessel, although he was acting under a commission from an insurgent Mexican chieftain.⁵

¹ See *The Attorney-General v. Kwock-a-Sing*, 5 L. R. P. C. App. 177.

² *United States v. Klintock*, 5 Wheaton, 144; *The United States v. The Malek Adhel*, 2 Howard, 210.

³ 2 Excheq. 166.

⁴ *United States v. Klintock*, 4 Wheaton, 144.

⁵ In *The Attorney-General v. Kwock-a-Sing*, 5 L. R. P. C. App., 1873, the charge of Sir Charles Hedges, judge of the High Court of Admiralty, to the grand jury, as reported in the case of *Rex v. Dawson*, 13 State Trials, 454, made in the presence and with the approval of Chief-Justice Holt, and several other common-law judges, was declared to be a correct exposition of the law as to what constitutes piracy *jure gentium*. He there said: "Piracy is only a sea term for robbery, — piracy being a rob-

It is proper to observe that the slave-trade, although condemned by the more enlightened conscience of the present day, is not piracy, or even felony *jure gentium*.¹ Slaves have, from the remotest antiquity until a comparatively recent period, been generally regarded as property, and the right of property implies the right of transportation and sale. A nation consequently cannot prevent the vessels of another nation from pursuing the slave-trade on the ocean, or even exercise the right of search, in time of peace, to ascertain

bery within the jurisdiction of admiralty. . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, with a felonious intention, in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." Yet the accused were held to have been guilty of piracy in violently taking possession of the vessel in which they had been shipped from China to the West Indies, although the act was not done *animo furandi*, but to regain their freedom, and they had been, in the opinion of the court below, virtually enslaved by force and fraud.

The subject was philosophically considered in *The United States v. The Malek Adhel*, 12 Howard, 252, where the question arose under the act of March 3, 1839, for the punishment of "piratical aggressions." "Where," said Story, J., "the act uses the word 'piratical' it does so in a general sense, importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for the purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretence of public authority. If he wilfully sinks or destroys an innocent merchant-ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*."

¹ See *Buron v. Denman*, 2 Excheq. 166; *Greenwood v. Carter*, 6 Mass. 338.

whether the foreign flag is not used to cover the violation of her own laws.

Such was the view taken by Lord Stowell on the case of *The Louisa*,¹ and adopted by the Supreme Court of the United States in *The Antelope*.² Torts not amounting to piracy under the law of nations may, however, have that character conferred upon them by Congress; and the slave-trade was declared to be piratical and a capital offence at an early period, although the statute can hardly be said to have been carried into effect before the Civil War.

The admiralty jurisdiction of the United States in civil cases has, as we have seen, been carried far beyond its original bounds, and now extends to all the navigable waters of the United States which are directly, or through intermediate channels, a means of commerce among the States and with foreign nations.³ Should Congress at any future period arrive at the conclusion that the criminal jurisdiction is coextensive with the civil, and carry their opinion into effect by a statute, the Supreme Court of the United States will have to determine whether the inference is just.⁴

Two things are essential, as the law now stands, to the exercise of the power to punish piracies and felonies committed on the high seas under the twelfth section of the act of April 30, 1790, chap. 36, and the Revised Statutes, section 5339. The act in question must have been done on waters which are so far connected with the sea as to be subject to the admiralty jurisdiction of the United States, and it must not have been committed within the jurisdiction of any particular State.⁵ If these requisites are satisfied the federal courts may take cognizance of the offence, although it was committed on a strait, bay, or sound, and not on the high seas in the full sense of the term.⁶

¹ 2 Dodson, 210.

² 10 Wheaton, 66.

³ See *ante*, p. 1004.

⁴ See *the United States v. Wiltberger*, 5 Wheaton, 76, 106, note *a*.

⁵ *United States v. Bevans*, 3 Wheaton, 339; *United States v. Furlong*, 5 Id. 184.

⁶ *United States v. Furlong*, 5 Wheaton, 184; see *The United States v.*

If the vessel be American, and the offence is committed by one of the crew or a passenger, the Circuit Court may take cognizance of it, although the murderer and the murdered man were both foreigners, and the blow was struck on board of a foreign vessel.¹ As was observed in the case cited, no difference can be supposed to exist between a murder committed on the seas by means of a gun discharged from a vessel, and by means of a boat-crew despatched for that purpose, as in the case before the court. Felonious acts done on the high seas by persons who are not citizens or subjects of the United States, on board of a ship or vessel belonging exclusively to subjects of a foreign State, on persons who are not American citizens or subjects, are seemingly not within the admiralty jurisdiction of the United States, or punishable by Congress.² But such is not the case as regards felonies committed on board of a vessel in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever.³

Wiltberger, 5 Wheaton, 76, for the meaning of the term "high seas" as used, without explanatory or qualifying words, in the twelfth section of the act of 1789, which relates to the right of Congress to punish crimes committed on board an American vessel within the jurisdiction of a foreign State.

¹ The United States v. Pirates, 5 Wheaton, 184, 194.

² See The United States v. Klintock, 5 Wheaton, 144, 151; United States v. Palmer, 3 Wheaton, 610.

³ See The United States v. Klintock, 5 Wheaton, 144, 152.

LECTURE LIII.

Criminal Jurisdiction of the United States over the District of Columbia and such other places as are ceded by the States or acquired by Treaty. — It is exclusive of the States and so far National that while the Offence must be committed within the Place, the Culprit may be arrested wherever he is found. — The Acquisition of Land within a State under the right of Eminent Domain does not confer Jurisdiction on the United States unless sanctioned by the State Legislature. — A State may reserve its Jurisdiction while ceding the Land, and when such is the case punish a Murder committed in a Fort belonging to the United States, although both Parties are in the Military Service of the Federal Government. — Congress have the Police Power in the Territories which is withheld in the States, and may enact any Law that is not forbidden by the Constitution. — The Violation of any necessary and proper Law passed by Congress may be visited with such Penalties as they choose to inflict. — An act which is injurious to a State and to the United States may be punished by both. — Congress cannot punish the Infraction of a State Law except by adopting it as their own, nor of any Law which is not within the Scope of the Powers conferred by the Constitution. — An Indictment involving a Federal question may be removed from a State to a Federal Court, and the accused liberated if unconstitutionally detained. — The Supreme Court has no general Authority to revise the Judgments of the Circuit Courts in Criminal Cases; but may give relief by a *habeas corpus* where the proceeding is without Jurisdiction or Unconstitutional.

LIMITED as is the power of Congress to prescribe penalties and inflict punishment within the States, it is co-extensive with the field of penal legislation in territories and places that have been ceded to the United States by the States, or by foreign nations. Article I., section 8, is as follows: "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district, not exceeding ten miles square, as may, by the cession of particular States and acceptance by Congress, become the seat of the government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the

the Constitution, but the power to inflict them was impliedly withheld. The meaning of the instrument, as read in the light of the Tenth Amendment, — that powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people, — was that the right to provide for the welfare of the community by penal legislation should remain in the States, and save in the enumerated instances be exercised by them only.

Such substantially was the argument, which is undeniably strong, and might be conclusive were it not for a clause in the Constitution which points so clearly in another direction as to leave no doubt of the meaning of the instrument as a whole.¹ Under the eighth section of the first article Congress have authority “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested in the United States, or any department or officer thereof.” A law is a compulsory rule of action. Rules that may be disregarded with impunity cannot properly be styled laws. It is therefore implied in every gift of the law-making power that the legislator may prescribe the penalty for the violation of the statutes which he enacts. In cases between individuals the compensation awarded to the injured party is ordinarily sufficient to prevent a repetition of the offence. But where the welfare of the community is involved, and the wrong, as often happens, is irreparable, the law would be without a sanction unless the offender could be made penally answerable. It is accordingly well settled that wherever Congress have authority to legislate, they may enforce obedience by fine, by imprisonment, or even by death. From the authority to establish post-offices and post-roads comes, as Chief-Justice Marshall pointed out, the right to punish the offence of robbing the mail; while that to call forth the militia carries with it an implied power to try by court-martial and sentence every one who does not obey the call.² And as the safety

¹ The Legal Tender Cases, 12 Wallace, 457, 535.

² See *McCulloch v. The State of Maryland*, 4 Wheaton, 316, 416.

the laws passed for carrying it into effect may be enforced throughout the length and breadth of the country, and wherever the sovereignty of the general government extends. A man who is guilty of murder within a State cannot be convicted or executed beyond its limits; but the trial of offences committed in places subject to the exclusive jurisdiction of the United States may be held, and the sentence carried into effect, in any locality which Congress may designate. As Chief-Justice Marshall observed in *Cohen v. Virginia*:¹—

“ Congress cannot punish felonies generally, and of consequence cannot punish misprision of felony except on special grounds. It is equally clear that a State, Maryland, for example, cannot punish persons who, in another State, conceal a felony committed in Maryland. And yet Congress, legislating exclusively for a fort, or for the District of Columbia, may punish those who out of that place conceal a felony committed within it. The solution is that the power vested in Congress to legislate for any place ceded by a State carries with it as an incident the right to make that power effectual. If a felon escapes out of the State in which the act was done, the governor cannot pursue him into another State and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as a local legislature for the fort, or other place where an offence is committed, the principle would apply to them as to other local legislatures, and a felon who should escape out of the fort could not be apprehended by the marshal except through a requisition on the governor of the State where he was a fugitive from justice. The principle does not apply, because Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character as the legislature of the Union. The rule applies to civil legislation as well as criminal; and any law that Congress are competent to make for the District of Columbia is so far a law for the entire country that an attempt without the District to obstruct its operation is punishable by Congress.”

It has been at the same time decided that as the States may withhold their consent to the purchase of land by the

¹ 6 Wheaton, 428.

general government, they may give it conditionally, and stipulate that the civil and criminal process of the State courts may be served, notwithstanding the transfer. Such provisions are intended to prevent places that have been ceded to the United States from becoming asylums for fugitives from justice, and do not derogate from the effect of the cession in other particulars.¹ So a State may, in granting the United States exclusive jurisdiction over a place within its limits, reserve the right of taxation as regards private property; and if the United States occupy the land they must recognize the condition.²

It seems to have been taken for granted at the outset of the government that the United States could not acquire land by purchase without the consent of the State legislatures; and the right to make such an acquisition, through the exercise of the right of eminent domain, was first authoritatively declared in the case of *Kohl v. The United States*.³ Either method may be taken, under the present course of decision, at the will of Congress; but the effect is simply to pass the title without touching the sovereignty of the State, which will remain unimpaired unless surrendered by the legislature, and may be exercised not only in civil cases, but for the punishment of crime.⁴ In *The People v. Godfrey* it was decided, in conformity with this principle, that the State of New York had exclusive cognizance of a murder committed in a fort belonging to the United States, but not ceded by the legislature, although both parties were in the military service of the United States, and formed part of the garrison. "To oust the courts of New York of their jurisdiction to support and maintain its laws and to punish crimes, it must be shown that an offence committed within the acknowledged limits of the State is clearly and exclusively cogni-

¹ *United States v. Cornell*, 2 Mason, 60; *The Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 533.

² *The Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525.

³ 91 U. S. 367; *United States v. Jones*, 109 U. S. 513; *Matter of Petition of The United States*, 96 N. Y. 227. See *ante*, p. 335.

⁴ *The People v. Godfrey*, 19 Johnson, 225; *Fort Leavenworth Co. v. Lowe*, 114 U. S. 525, 528.

zable by the laws and courts of the United States. In *The United States v. Bevans*,¹ Chief-Justice Marshall observed that to bring the offence within the jurisdiction of the courts of the Union, it must have been committed out of the jurisdiction of any State; it is not (he says) the offence committed, but the place in which it is committed, which must be out of the jurisdiction of the State. It does not therefore enter into the consideration of the question that the prisoner and the deceased were in the service of the United States when the crime was perpetrated.”²

It does not vary the case that the United States were originally not only owners of the place in question, but sovereign. Although the vast territory lying northwest of the Ohio and between the Mississippi River and the Rocky Mountains belonged to the General Government when the Constitution was adopted, and the numerous States which now occupy it came into being through acts of Congress, they were admitted on a footing of equality with the original thirteen, and became, like them, endowed with the rights of political dominion and sovereignty, subject only to the restrictions expressly or impliedly imposed by the Constitution. In admitting Kansas, Congress reserved the tract known as “The Fort Leavenworth Reservation,” including Fort Leavenworth and the adjacent land; and in so doing might have stipulated not only that the General Government should retain the title, but for the retention of the entire judicial and legislative authority over the locality so long as it should be used for military purposes. As no such exception was made it became part of the territory of Kansas, and was governed by the laws passed by the State, and under the jurisdiction of her courts. It followed that the legislature might well confer jurisdiction on the United States for general purposes, and yet reserve the right “to tax railroad, bridge, or other corporations, their franchises and property within the Reservation.”³

¹ 3 Wheaton, 336.

² *The People v. Godfrey*, 17 Johnson, 225.

³ *Fort Leavenworth R. R Co. v. Lowe*, 114 U. S. 525.

rious to itself or its citizens, although they are also forbidden and punishable by the United States.¹ In *Fox v. Ohio*, the accused was sentenced for passing false coin with an intent to defraud, and in *Moore v. The People*,² for harboring a fugitive slave contrary to the statutes of Illinois, notwithstanding the objection that a like punishment might have been inflicted under the acts of Congress. Admitting that the plaintiff in error would be liable to an action under the act of Congress, for the same acts of harboring and preventing the owner from retaking his slave, it did not follow that he would be twice punished for the same offence. "An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace in consequence of the same act; and may be said, in common parlance, to be twice punished for the same offence. Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, — a riot, assault, or a murder, — and subject the same person to a punishment, under the State laws, for a misdemeanor or felony. That either or both may (if they see fit) punish such an offender cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other; consequently, this court has decided, in the case of *Fox v. The State of Ohio*,³ that a State may punish the offence of uttering or

¹ *Fox v. Ohio*, 5 Howard, 432; *Houston v. Moore*, 5 Wheaton, 49.

² 14 Howard, 13.

³ 5 Howard, 432.

passing false coin, as a cheat or fraud practised upon its citizens; and in the case of *The United States v. Marigold*,¹ that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States.”²

It is established under the same principle that Congress may pass laws for the protection of citizens or aliens against intimidation, injury, or oppression, in the exercise of any right or privilege secured by the Constitution or laws of the United States, or because of their having exercised the same.³ In *The United States v. Waddell* the defendant was convicted, under such a statute, for a conspiracy to prevent the prosecutor from entering on the land which he had purchased from the United States, to perfect his title to it as a homestead. And in *The United States v. Yarbrough* the principle was held broad enough to sustain a conviction for having conspired to intimidate a “citizen of African descent” in the exercise of his right to vote for a member of Congress, as given by the laws of the State, and guaranteed by the Fifteenth Amendment. “Wherever the function in which the party is engaged, or the right which he is about to exercise, depends on the laws of the United States, it is the duty of the government to see that he may act freely, and to protect him from violence while so doing.”⁴

The police power is, as we have seen, generally reserved to the States, and cannot be exercised by the United States except to protect the government, to restrain the States, to guard the rights and privileges conferred by the Constitution, to regulate the Territories, or to punish certain enumerated offences which concern the nation as a whole.⁵ An act of Congress which transcends these bounds, by imposing

¹ 9 Howard, 560.

² *Moore v. The People*, 14 Howard, 13.

³ *The United States v. Waddell*, 112 U. S. 76; *Ex parte Yarbrough*, 110 Id. 651. See *Baldwin v. Franks*, 120 Id. 678, 685, 705.

⁴ *Ex parte Yarbrough*, 110 U. S. 565; *United States v. Waddell*, 112 Id. 76, 80.

⁵ See *ante*, p. 1120.

penalties for a conspiracy to deprive any person of the equal protection of the laws, will consequently be void, as embracing "those who conspire to deprive him of his rights under the laws of a State, and those who conspire to deprive him of his rights under the Constitution, laws, and treaties of the United States."¹ The rule that the constitutional part of a statute may be enforced, and the unconstitutional part rejected, is inapplicable, unless the parts are so distinctly separable that each can stand alone, and the court is able to see and declare that the intention of the legislature was that the part pronounced valid should be enforceable, even though the other part should fail."²

Another result of our dual system may be noticed in this connection. A suit which depends, as regards the plaintiff or defendant, on an authority conferred by the United States is within the grant of judicial power, and may be brought by removal or appeal before a federal tribunal. The rule applies in criminal cases as well as civil, because the States would otherwise be in one branch of their jurisdiction paramount, and might impede the operations of the federal government by subjecting its officers to a prosecution that would result in imprisonment or death. An indictment which involves a federal question may, consequently, be transferred to a circuit court of the United States, although the offence charged is a breach of the local law and not punishable by Congress. Under these circumstances the federal courts adopt the State laws as the rule of their proceedings so far as they are consistent with the Constitution of the United States, and give such a sentence as the State court ought to have pronounced had the case gone before it to judgment.³

If State sovereignty has been restricted through the development of the federal government, it has generally been

¹ *Baldwin v. Franks*, 120 U. S. 678, 685. See *ante*, p. 442.

² *United States v. Reese*, 92 U. S. 214; *Trade Mark Cases*, 100 Id. 82; *Virginia Coupon Cases*, 114 Id. 269, 305; *Baldwin v. Franks*, 120 Id. 678, 689. See *The Packet Co. v. Keokuk*, 95 Id. 80; *Presser v. Illinois*, 116 Id. 252.

³ *Tennessee v. Davis*, 100 U. S. 260.

owing to an aggression on the part of the States; and the first exercise of the right of removal in criminal cases was the Force Bill, passed in 1832, during the presidency of Jackson, in response to a law of South Carolina rendering it penal for the revenue officers to collect the duties imposed by Congress. No case was, I believe, actually removed under the provisions of this bill, and the power lay dormant until it was called forth by the disordered condition of the country at the close of the Civil War. It concerns the government in a point which is more essential to the effectual exercise of its powers than the removal of any civil cause. If the officers of the United States could be indicted before an adverse jury, and judges appointed by a hostile majority, for acts done in the performance of their duty, it might be difficult to collect the revenue, or enforce any unpopular law.¹ As was said in *Martin v. Hunter*,² "The General Government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers." It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the United States are powerless to interfere at once for their protection, the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer, not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if after trial and final judgment in the State court the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty

¹ *Tennessee v. Davis*, 100 U. S. 265.

² 1 *Wheaton*, 363.

during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution.

In *Tennessee v. Davis*, the court held that an indictment against a deputy-collector of the United States for a homicide committed in the discharge of his official duties might be transferred, under section 643 of the Revised Statutes, to the Circuit Court for the Middle District of Tennessee, which would adopt and apply the laws of the State in so far as they were in accordance with the Constitution of the United States, precisely as the State court would, or ought, to have done had the cause not been withdrawn from its jurisdiction.

“ ‘Criminal and civil cases are equally within the judicial domain of the United States, and there is nothing in the terms of the grant to indicate that whatever power may be exerted over a civil case may not also be exerted in a criminal one. A case under the Constitution and laws of the United States may as well arise in a criminal prosecution as in a suit brought to vindicate a private right.’ What constitutes such a case was defined in *Cohen v. Virginia*.¹ It is not merely one where a party comes into court to demand something conferred upon him by the Constitution, or by a law or treaty of the United States. A case consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution, or a law or a treaty of the United States, whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right, or privilege, or claim, or protection, or defence of the party, in whole or in part, by whom they are asserted.² It was said in *Osborn v. The Bank of the United States*:³ ‘When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.’ And a case arises under the laws of the United States

¹ 6 Wheaton, 379.

² Story on the Constitution, section 1647; 6 Wheaton, 379.

³ 9 Wheaton, 738.

when it arises out of the implication of the law. Chief-Justice Marshall said, in the case last cited: 'It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control. . . . The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone, — that is, the judicial power is the instrument employed by the government administering this security.'

"The constitutional right of Congress to authorize the removal before trial of civil cases arising under the laws of the United States has long since passed beyond doubt. It was exercised almost contemporaneously with the adoption of the Constitution, and the power has been in constant use ever since. The Judiciary Act of Sept. 24, 1789, was passed by the first Congress, — many members of which had assisted in framing the Constitution; and though some doubts were soon after suggested whether cases could be removed from State courts before trial, those doubts soon disappeared. Whether removal from a State to a federal court is an exercise of appellate jurisdiction, as laid down in Story's Commentaries on the Constitution, section 1745, or an indirect mode of exercising jurisdiction, as intimated in *Railway Co. v. Whitton*,¹ we need not now inquire. Be it one or the other, it was ruled in the case last cited to be constitutional. But if there is power in Congress to direct a removal before trial of a civil case arising under the Constitution or laws of the United States, and direct its removal because such a case has arisen, it is impossible to see why the same power may not order the removal of a criminal prosecution when a similar case has arisen in it. The judicial power is declared to extend to all cases of the character described, making

¹ 13 Wallace, 270.

no distinction between civil and criminal; and the reasons for conferring upon the courts of the national government superior jurisdiction over cases involving authority and rights under the laws of the United States are equally applicable to both. As we have already said, such a jurisdiction is necessary for the preservation of the acknowledged powers of the government. It is essential also to a uniform and consistent administration of national laws. It is required for the preservation of that supremacy which the Constitution gives to the General Government by declaring that the Constitution, and laws of the United States made in pursuance thereof, and the treaties made or to be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary thereof notwithstanding. The founders of the Constitution could never have intended to leave to the possibly varying decisions of the State courts what the laws of the government it established are, what rights they confer, and what protection shall be extended to those who execute them. If they did, where is the supremacy over those questions vested in the government by the Constitution? If, whenever and wherever a case arises under the Constitution and laws or treaties of the United States, the national government cannot take control of it, whether it is civil or criminal, in any stage of its progress, its judicial power is at least temporarily silenced, instead of being at all times supreme. In criminal, as well as civil, proceedings in State courts, cases under the Constitution and laws of the United States might have been expected to arise, as in fact they do. Indeed, the powers of the General Government, and the lawfulness of the authority exercised or claimed under it, is quite as frequently in question in criminal cases in State courts as they are in civil cases, in proportion to their number. It is immaterial that the act authorizing the removal does not prescribe the procedure, or declare according to what law the trial shall be conducted. Such an omission may be supplied by intendment.

“The circuit courts of the United States have all the appliances which are needed for the trial of any criminal case. They adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State’s criminal law. They are not foreign courts. The Constitution has made them courts within the States to administer the laws of the States in certain cases; and so long as they keep within the jurisdiction assigned to

them their general powers are adequate to the trial of any case. The supposed anomaly of prosecuting offenders against the peace and dignity of a State in tribunals of the General Government grows entirely out of the division of powers between that government and the government of a State; that is, a division of sovereignty over certain matters. When this is understood (and it is time it should be) it will not appear strange that, even in cases of criminal prosecutions for alleged offences against a State in which arises a defence under United States law, the General Government should take cognizance of the case and try it in its own courts, according to its own forms of proceeding."

It has also been decided that the power of removal may be exercised where a constitutional requirement is violated to the injury of the accused. In *Strauder v. West Virginia*,¹ a negro who had been arraigned and was about to be tried for murder before a jury that had been summoned and impanelled under a State law which restricted the duty and privilege of serving as jurors to white male citizens, was allowed to transfer the cause to the Circuit Court of the United States, under the provision of the Revised Statutes, section 641, that where "any civil suit or criminal proceeding is commenced for any cause whatsoever, any one who is denied, or who cannot enforce, in the judicial tribunals of the State, any right secured to him by any law providing for the equal civil rights of citizens of the United States, such suit or proceeding may be removed before trial to the next circuit court of the United States." This law was founded on the language of the Fourteenth Amendment: "No State shall make or enforce any law which shall curtail the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of its laws. . . . The Congress shall have power to enforce by legislation the provisions of this act." The court held that the object of the amendment was that all citizens should stand on an equality before the law, and that no discrimination should be made

¹ 100 U. S. 303. See *ante*, pp. 524, 860, 867.

because of race or color. The question was not whether a negro had a right to a jury composed in whole or in part of persons of his own race, but whether all persons of that race could be excluded by State legislation, so that no colored man could by any possibility serve on the juries by which colored men were tried. Such a discrimination is at variance with the principle of the great charter, that the persons by whom the accused is tried shall be his peers or equals. The statute under which the jury had been summoned in the case on hand was, therefore, contrary in spirit and letter to the Fourteenth Amendment, and the appellant was entitled to have the indictment removed to a court where the prisoner could have a lawful jury.

It results from this decision that while no one is entitled to a jury of his own race or color he may, nevertheless, require that the State shall not exclude such persons from the panel, and shall, on the contrary, give all men, of whatever descent or extraction, an equal chance of taking their place in the jury-box, and consequently of having a tribunal to which they can appeal with confidence when their own rights are involved. If the local law falls short of this requirement, the cause may be transferred to the federal courts as a means of enforcing the right which the Constitution guarantees. Such a transfer cannot be made, under the existing acts of Congress, simply because colored men were not impanelled, although that may afford ground for an indictment, under the act of March 1, 1875, against the officer who is chargeable with the neglect. The Fourteenth Amendment undoubtedly applies to all the branches of the State government; and the legislative, executive, and judicial departments may be equally compelled to observe the restraints which it imposes. But section 641 of the Revised Statutes is not as broad as the Amendment. It does not include cases where the rights of a citizen are violated during the trial by judicial action, or by a partial or injurious discrimination in the sentence; and the remedy must then be sought, not in the removal of the cause, but in an appeal to the higher courts of the State, and ultimately to the supreme national tribunal.

It is established under this line of argument that if negroes are wrongfully excluded from the jury-box, not by the laws or the Constitution of the State, but in consequence of the partial or hostile action of the officers whom she employs, the proper course is to challenge the array, or move to quash the panel or indictment; and if the motion be refused, a writ of error will lie to the Supreme Court of the United States. Such was the judgment of that tribunal when the question arose in *Neal v. Delaware*.¹ Two negroes were convicted in Delaware for the crime of rape by a jury composed exclusively of white men, and summoned, according to an affidavit filed by the prisoners, with the intention of excluding colored persons, contrary to the laws of the State; and as the State court overruled the objection and went on to trial, the sentence was reversed and the cause remanded. Waite, Ch.-J., and Field, J., dissented on the ground that the exclusion complained of was not shown to be on account of the race or color. It might well be, as the Supreme Court of Delaware had declared in giving judgment, that owing to the condition of serfage from which the colored race had recently emerged, no colored man in the county possessed the intelligence and knowledge requisite for the responsible duty of a juror. The laws of Delaware imposed no disqualification because of race, but they made it incumbent on the sheriff to select sober and judicious men; and until evidence was adduced to the contrary, it must be presumed that his duty was fulfilled.

Where an indictment for a breach of the peace of a State involves a right conferred by a law or treaty of the United States, not only may the cause be removed, but a *habeas corpus* may issue to take the accused out of the hands of the local authorities, and bring him before the Circuit Court, which may remand him, set him at large, or hand him over to any tribunal having cognizance of such offences.² In *Wildenhuss' Case* the court held that such a writ might be issued by the Circuit Court for the District of New Jersey, in order to ascertain whether a seaman who was confined in the jail of Hudson County in that State to answer for a homicide

¹ 103 U. S. 370. See *ante*, p. 538.

² *Wildenhuss' Case*, 120 U. S. 1; *Ex parte Royall*, 117 Id. 241, 252.

committed on board the Belgian steamer "Woodland," while lying at the dock in Jersey City, should be delivered to the Belgian consul, under a treaty between the United States and Belgium, providing that the consuls and consular agents of either nation should have exclusive charge of the internal order of the merchant-vessels of their nation, and that the local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb tranquillity and public order on shore or in the port. But it was at the same time decided that the treaty did not cover grave offences which, though committed on board a vessel, disturbed the peace of the community; and that the accused had justly been remanded to the jail from whence he came.

A person who is committed or imprisoned under a decree or sentence of a federal tribunal which exceeds its jurisdiction, or is not an authority for his detention, may be discharged by the Supreme Court of the United States on a writ of *habeas corpus*.¹ A conviction for an infamous crime on an information filed by the Attorney-General of the United States, or a district-attorney, without a presentment by the grand-jury, is contrary to the Fifth Amendment, and comes within this principle. But a judgment founded on an erroneous exercise of jurisdiction will stand until reversed, and can be corrected only by a writ of error.²

"The Supreme Court has no general authority to review on error or appeal the judgments of the Circuit Courts of the United States in cases within their criminal jurisdiction; . . . but it is equally well settled that when a prisoner is held under the sentence of any court of the United States, in regard to a matter wholly beyond the jurisdiction of that court, it is not only within the authority of the Supreme Court, but it is their duty, to inquire into the cause of the commitment, and discharge the person thus illegally confined."³ On the

¹ *Ex parte Lange*, 18 Wallace, 163, 166; *Ex parte Wilson*, 114 U. S. 417; *In re Sawyer*, 124 Id. 200.

² *Ex parte Watkins*, 3 Peters, 193, 202; *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Bigelow*, 113 Id. 328; *Ex parte Harding*, 120 Id. 783. See *Spies v. Illinois*, 123 Id. 131.

³ *Ex parte Kearney*, 7 Wheaton, 38; *Ex parte Parks*, 3 U. S. 18; *Ex parte Yarbrough*, 110 Id. 651, 653.

other hand, if the offence is within the jurisdiction of the Circuit Court, it must determine the sufficiency of the indictment: and as a writ of error cannot be taken to the Supreme Court of the United States, the judgment will be final and conclusive. But this remark does not apply when the law creating the offence is unconstitutional; and as the proceeding is baseless, relief may be obtained on a *habeas corpus*.¹

The State courts cannot ordinarily enforce the penal laws of the federal government, nor the federal courts the penal laws of a State; but either government may prescribe a penalty for the breach of a law made by the other, which concerns itself and falls within the scope of its powers; and the law so adopted will then become its own, and may be administered by its tribunals.² In *Houston v. Moore* the plaintiff in error had been convicted and sentenced under a law of the State of Pennsylvania, which, after declaring that any officer, non-commissioned officer, or private of militia, neglecting or refusing to serve when called into actual service in pursuance of any order or requisition of the President of the United States, should be liable to the penalties defined in the act of Congress passed Feb. 25, 1795, went on to provide that the offender might be tried and sentenced to undergo the aforesaid penalties by a court-martial assembled under the laws of the State. The sentence was affirmed by the highest State tribunal, and a writ of error taken from their judgment to the Supreme Court of the United States. It was urged in the course of the argument that there could not be two distinct tribunals sitting for the trial of the same crime. Otherwise the offender might for one fault be punished twice, or what was equally anomalous, sentenced in one court and acquitted in the other. As soon as the militia were called to the field the United States took jurisdiction; and as the end in view was one peculiarly re-

¹ *Ex parte Yarbrough*, 110 U. S. 651, 653.

² *Houston v. Moore*, 5 Wheaton, 49; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Yarbrough*, 110 Id. 469.

quiring discipline and method, their authority must be exclusive. This reasoning convinced Mr. Justice Story, who delivered a dissenting opinion. But the majority of the court held that, although a State could not legislatively vary or add to the penalty prescribed by Congress, they might, notwithstanding, vest a concurrent jurisdiction in their tribunals to inflict the punishment which Congress had devised. If the State courts could not ordinarily take cognizance of acts punishable under the laws of Congress, it was because those laws gave the circuit courts exclusive jurisdiction of all crimes and offences cognizable under the authority of the United States, except where the laws of the United States should otherwise provide; which accounted for the proviso in the act of Feb. 24, 1867, ch. 75, concerning the forgery of the notes of the Bank of the United States, that nothing which it contained should be construed to deprive the courts of the individual States of jurisdiction under their laws of offences made punishable by that act. Military offences were not included in the act of Congress conferring jurisdiction on the circuit courts; and although the militia laws provided that disobedience to the President's call should be cognizable by a court-martial convened under the authority of the United States, the jurisdiction so conferred was not declared to be exclusive. The national and State courts-martial might, therefore, well exercise the concurrent jurisdiction which was authorized by the laws of the State and was not prohibited by the laws of the United States. Congress could not confer jurisdiction on a State tribunal, but when jurisdiction existed it might well be exercised for the purpose of enforcing an act of Congress.

In this instance Pennsylvania adopted and enforced an act of Congress; and it has been decided on like grounds that Congress may render it a penal offence against the United States for any officer of election, at an election held for a representative in Congress, to neglect to perform, or to violate any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to

affect such election, or to make a fraudulent certificate of the result.¹

¹ *Ex parte Siebold*, 100 U. S. 371. See *Ex parte Yarbrough*, 110 Id. 465. See *ante*, p. 527.

"The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws, and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose, and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

"Another objection made is that if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency, — at the suit of the State and at the suit of the United States. But the answer to this is that each government punishes for violation of duty to itself only. When a person owes a duty to two sovereigns, he is amenable to both for its performance, and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided, although considerable discussion bearing upon the subject has taken place in this court tending to the conclusion that such a plea cannot be sustained. In reference to a conviction under a State law for passing counterfeit coin, which was sought to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offence, Mr. Justice Daniel, speaking for the court, said: 'It is almost certain that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which these author-

ities might ordain and affix to their perpetration' (*Fox v. The State of Ohio*, 5 Howard, 410). The same judge, delivering the opinion of the court in the case of *United States v. Marigold*, 9 Howard, 569, where a conviction was had under an act of Congress for bringing counterfeit coin into the country, said, in reference to Fox's Case: 'With the view of avoiding conflict between the State and federal jurisdictions, this court, in the case of *Fox v. State of Ohio*, have taken care to point out that the same act might, as to its character and tendencies and the consequences it involved, constitute an offence against both the State and federal governments, and might draw to its commission the penalties denounced by either as appropriate to its character in reference to each. We hold this distinction sound;' and the conviction was sustained. The subject came up again for discussion in the case of *Moore v. State of Illinois*, 14 Id. 13, in which the plaintiff in error had been convicted under a State law for harboring and secreting a negro slave, which was contended to be properly an offence against the United States under the fugitive slave law of 1793, and not an offence against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: 'Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both.'

"Substantially the same views are expressed in *United States v. Cruikshank* (92 U. S. 512), referring to these cases. A variety of instances may be readily suggested in which it would be necessary or proper to apply it. Suppose, for example, a State judge having power under the naturalization laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of Congress providing penalties for that offence, even though he might also, under the State laws, be indictable for forgery, as well as liable to impeachment?" *Ex parte Siebold*, 100 U. S. 371.

LECTURE LIV.

Distribution of Jurisdiction among the Federal Courts. — The Original Jurisdiction of the Supreme Court is confined to Cases affecting Ambassadors, other Public Ministers, and Consuls, and those in which a State will be a Party. — The grant of Original Jurisdiction in such Cases does not preclude the Exercise of Appellate Jurisdiction in the same Cases. — It is not Exclusive of the Inferior Courts. — The Federal Laws may be administered by the State Courts, and the State Laws by the Federal Courts. — Demands arising in one Sovereignty may be Enforced by the Tribunals of another, and an Assignee in Bankruptcy may proceed in a State Court. — Aliens may be Naturalized by the State Courts, which may also, if Congress so provide, determine the Compensation due for the Exercise of Eminent Domain by Congress.

AN inquiry as to the nature and extent of the grant of judicial power may appropriately be followed by the question how is it apportioned among the courts of the United States, and when is their jurisdiction exclusive of the State tribunals? Article III., section 1 of the Constitution, provides that "the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may from time to time ordain and establish." The subjects on which the power is to be exercised are enumerated in the second section of the same article, first subdivision; and as regards those subjects the first section is broad enough to confer jurisdiction in every form. Were this all, original jurisdiction might have been distributed among courts as Congress thought proper, except that well have been denied the

appellate power which its title implies. The second subdivision of the second section, however, provides that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before-mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make," — the cases before-mentioned being the cases enumerated in the general grant of judicial power, which, as we have seen, includes not only cases where the character of the parties gives jurisdiction, but "all cases arising in law or equity under this Constitution, the laws of the United States, and the treaties made or to be made under their authority."

A question here naturally arises, Is this distribution exclusive, or may the Supreme Court take appellate jurisdiction in cases where, from the character of the parties, it might exercise original jurisdiction? *Prima facie* the word "shall" is imperative, but not exclusive. It commands, but is not necessarily prohibitory. If, indeed, a particular method is enjoined, every other of a different or inconsistent character will be forbidden relatively to the purpose in view and the agent to whom the order is addressed; but an injunction to use a means for a specific purpose will not preclude the use of the same means for other purposes, nor prevent third persons from using different means to effect the same purpose. This argument might be conclusive were it not that since jurisdiction is conferred in the most general terms by the first section, a declaration that the Supreme Court shall have original jurisdiction in certain instances would have been a useless reiteration had not the framers of the Constitution intended to limit or preclude, and not to enable. So the provision, "in all the other cases before-mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact" should, to render the article consistent as a whole, be read as meaning that its jurisdiction in such cases shall be only appellate,

and not as precluding the exercise of appellate jurisdiction in cases where original jurisdiction is conferred. Thus interpreted the article appears in its true light, as designed to give the Supreme Court an original jurisdiction, which, if Congress thought fit, might be rendered exclusive in cases concerning the States, or the representatives of foreign powers, and to prevent Congress from burdening it with original jurisdiction in other cases.¹ For like reasons the grant of original jurisdiction to the Supreme Court in cases affecting ambassadors, other public ministers, and consuls, does not preclude the circuit courts from taking cognizance of such cases originally, or by removal from the State tribunals.² Hence a suit brought by a State against a citizen may be transferred to a circuit court of the United States, or brought on an appeal or a writ of error before the national court of last resort.³

These questions were considered in *Marbury v. Madison*,⁴ which is noteworthy not only for the point directly involved, but as having authoritatively established that the judicial branch of the United States is paramount, and may virtually annul every act or ordinance of the States, or other departments of the government which is not political,⁵ by declaring it invalid, with the necessary consequence that the persons proceeding under it, or attempting to carry it into execution, may be made answerable as trespassers.⁶

The circumstances were peculiar, and might afford ground for hesitation. Not only was the Constitutional problem entirely new, but there was reason to apprehend that if the court issued the writ the President would treat the question

¹ *Cohen v. Virginia*, 6 Wheaton, 274; *Ames v. Kansas*, 111 U. S. 449.

² *United States v. Ravara*, 2 Dallas, 297; *Davis v. Packard*, 7 Peters, 276; *Graham v. Stucken*, 4 Blatchford, 50; *Gittings v. Crawford*, Taney's Decisions, 1; *Börs v. Preston*, 111 U. S. 252.

³ *Cohen v. Virginia*, 6 Wheaton, 274; *Ames v. Kansas*, 111 U. S. 449, 469.

⁴ 1 Cranch, 137.

⁵ See *Marbury v. Madison*, 1 Cranch, 137, 177.

⁶ See *ante*, p. 123.

as political, and direct the Secretary to disobey. Certain commissions, which had been signed by John Adams during the last night of his term of office, remained undelivered in the department, and were withheld by his successor, Thomas Jefferson.¹ An application was then made to the Supreme Court to compel the delivery of the commissions by a *mandamus* addressed to the Secretary of State, but refused on the ground that so much of the Judiciary Act as authorized that tribunal to issue such writs "in cases warranted by the principles and usages of law to courts appointed, or persons holding office under the authority of the United States" carried the jurisdiction of the Supreme Court beyond the limits set by the grant of judicial power. The Chief-Justice said, in delivering judgment: —

"It is contended that, as the whole judicial power of the United States is vested in one Supreme Court, and such inferior courts as Congress may from time to time establish, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, Congress may confer original jurisdiction on that court in any case arising out of the judicial power of the United States. Had the framers of the Constitution designed to leave it in the discretion of the legislature to apportion the judicial power of the court as they thought fit, they would simply have defined the judicial power and the tribunals in which it was to be vested. The subsequent part of the section was mere surplusage if such was the construction. If Congress were at liberty to give the court appellate jurisdiction where the Constitution declares that their jurisdiction shall be original, and original where the Constitution declares that it shall be appellate, the distribution of jurisdiction made in the Constitution was form without substance. When an instrument organizing a judicial system divides it into one supreme and as many inferior courts as the legislature shall establish, and then, after enumerating their powers, proceeds so far in distributing them as to define the jurisdiction of the Supreme Court by declaring the cases in which it shall take original jurisdic-

¹ See and compare McMaster's *History of the People of the United States*; Parsons's *Life of Jefferson*, 585; Randolph's *Domestic Life of Jefferson*, 307; and Adams's *Administration*, Philadelphia, 1816.

tion, and that in all others jurisdiction shall be appellate, the plain import of the words is that in one class of cases the jurisdiction is original, not appellate; in the other, appellate, not original. The court, therefore, could not issue a *mandamus*, unless in the exercise of an appellate jurisdiction, or as a means of enabling them to exercise such jurisdiction."

The generality of this language led to an argument tending, singularly, to lessen the dignity and usefulness of the Supreme Court. If the grant of judicial power in the Constitution was, as the Chief-Justice had intimated, distributive, dividing the sum of jurisdiction into two unequal portions, whatever was given in one branch of the clause was necessarily withdrawn from the operation of the other. The court had original jurisdiction in every case where a public minister, a consul, or a State was a party. It could not, therefore, exercise appellate jurisdiction in any such case. This would be true even if the case arose under the Constitution, the laws, or the treaties of the United States. For although the character of the cause might under these circumstances be within the appellate jurisdiction of the court, it would, from the character of the parties, fall within the grant of original jurisdiction; and, as this had been shown to be exclusive, it would preclude the court from exercising appellate jurisdiction. This reasoning would have more weight had the object of the framers of the Constitution been the distribution of a single power. When original jurisdiction is conferred upon one court for certain purposes, and upon another for certain other purposes, each may be confined to the jurisdiction expressly given. But an appellate differs so essentially from an original jurisdiction that a declaration that a court shall have the one in certain instances cannot be construed as prohibiting the exercise of the other in the same instances. An appellate jurisdiction is by the terms of the Constitution conferred in all the other cases above mentioned; that is to say, in every case where jurisdiction arises from the character of the cause, or from the character of the parties, and which is not embraced in the grant of original jurisdiction. And as this is confined

to cases affecting ambassadors, and other public ministers, and consuls, and those in which a State shall be a party, it cannot operate to exclude cases where jurisdiction is conferred by the character of the cause.

The question arose in *Cohen v. Virginia*,¹ where the Chief-Justice took occasion to review and explain the judgment which had been pronounced in *Marbury v. Madison* : —

“ The Constitution gave the Supreme Court original jurisdiction in certain enumerated cases, and an appellate jurisdiction in all others. Among those in which jurisdiction was to be exercised in the appellate form were cases arising under the Constitution and laws of the United States. These provisions of the Constitution were equally obligatory, and should equally be observed. Where a State is a party, the jurisdiction of the court is original. But a case to which a State is a party may arise under the Constitution and laws of the United States. Under these circumstances the case will, relatively to the character of the party, be within the original jurisdiction, and relatively to the character of the cause, within the appellate jurisdiction of the court. What then would be the duty of the court? Certainly to put such an interpretation on the Constitution as would give effect to both provisions. When a question involving the Constitution or a law of the United States arose in the progress of a cause, the jurisdiction of the court could be exercised only in its appellate form. To deny the right to exercise it in this form was to deny the right to exercise it at all, — to construe a clause distributing the power of the Supreme Court in such a manner as to impair the power itself. Such a construction could only be justified on the ground of necessity, and no such necessity existed under the article in question. Affirmative words should not receive a negative interpretation, unless the case was one where such an interpretation was essential to their full or effective operation. The affirmative words by which original jurisdiction was conferred on the Supreme Court in certain instances might be interpreted as negating the right to exercise original jurisdiction in any other instances, because they would otherwise be unmeaning surplusage; but they might have full effect without excluding the right to exercise an appellate jurisdiction. The Constitution declares that where a State is a party the Supreme Court shall have

¹ 6 Wheaton, 264, 392.

original jurisdiction ; but it does not say that the appellate jurisdiction given in cases arising under the Constitution and laws of the United States shall not be exercised where a State is a party. The powers of the Supreme Court were defined, but there was no definition of the powers of the inferior courts. They might, consequently, exercise original jurisdiction concurrently with the Supreme Court. If a State were to sue a citizen of another State in a circuit court, the Supreme Court could not, if the argument for the defendant in error was sound, exercise appellate jurisdiction ; and the strange result would follow of a superior court unable to revise the judgment of an inferior court, because the superior court had original jurisdiction of the cause in which the judgment was pronounced. In like manner the Supreme Court had original jurisdiction in cases affecting ambassadors, other public ministers, and consuls. The object of this provision was to place the representatives of foreign governments under the protection of the national judiciary, and withdraw them from the power of the States. Yet if the construction was sound, and a suit were brought against a foreign minister in a State tribunal, the Supreme Court could neither revise nor overrule the judgment. Such an interpretation would defeat the obvious intention of the Constitution, and must therefore be laid aside. On a just construction of that instrument, the original jurisdiction of the Supreme Court was limited to certain enumerated instances. In every other instance to which the judicial power of the United States extended, their jurisdiction must be exercised in the appellate, and only in the appellate form. And where the character of the cause was such as to confer jurisdiction in that form, the right to exercise it would not fail because the case was within the grant of original jurisdiction."

These cases and the subsequent course of decision lead to the following inferences: The courts of the United States are tribunals of limited jurisdiction, deriving their authority solely from the Constitution. They have no authority that is not given by that instrument, and cannot go in any case beyond the terms of the grant.¹ These confer jurisdiction in two classes of cases,—one depending on the character of the cause, the other on the character of the parties. The

¹ *Grace v. American Ins. Co.*, 109 U. S. 278, 283; *Robertson v. Cease*, 97 Id. 616; *Börs v. Preston*, 111 Id. 252, 255.

Supreme Court has original jurisdiction in three cases belonging to the latter class, — where a State, where a foreign minister, or where a consul is a party. They have appellate jurisdiction in every case within the general grant of judicial power in the Constitution, whether it could or could not come under their original jurisdiction. The affirmative words by which original jurisdiction is conferred in the instances above-mentioned exclude the right to take such jurisdiction in any other instance; but they do not operate as a restriction on the grant of appellate jurisdiction, or preclude a concurrent jurisdiction in the inferior courts of the United States. The circuit and district courts may accordingly take cognizance, concurrently with the Supreme Court, of suits brought by or against a consul, or where a public minister or ambassador appears in court as plaintiff; and every such suit may be removed from a State court to the federal tribunals.¹ If suits against a foreign minister must be brought in the Supreme Court, it is from the provisions of the Judiciary Act, and not from the Constitution.

The better opinion would also seem to be that Congress may, if they think fit, confer an appellate jurisdiction on an intermediate tribunal, and require all causes arising on a writ of error to be brought there in the first instance, before going to the Supreme Court. This view was suggested in "The Federalist," No. 82, and has since received the sanction of Kent and Story in their Commentaries on Constitutional Law. It results from the words of the Constitution, which declare that the judicial power of the United States shall be vested in a Supreme Court and such inferior courts as Congress may from time to time establish, without imposing any restriction on the jurisdiction of the inferior courts.²

The rule is established on this basis by the case of *Ames v. Kansas*.³ The court there adopted the reasoning of Chief-Justice Marshall in *Cohen v. Virginia*, and held that it ap-

¹ *Davis v. Packard*, 7 Peters, 276; *Gittings v. Crawford*, 1 Taney's Decisions, 1; *Ames v. Kansas*, 111 U. S. 449, 468.

² See *Cohen v. Virginia*, 6 Wheaton, 396.

³ 111 U. S. 449.

plied to the inferior courts of the United States. It followed that a case arising under the Constitution or an act of Congress might be brought in the circuit courts originally, by way of removal, or, as we may infer, on appeal or writ of error, although a State was the plaintiff, and the case fell within the grant of original jurisdiction to the Supreme Court of the United States. Such also is the rule, where Congress do not otherwise provide, as regards suits by or against ambassadors, public ministers, and consuls.¹

Another question of equal moment remains to be considered. Is the judicial power of the United States exclusive, and to what extent, of the jurisdiction of the State tribunals? It is a well-established principle that the grant of a power to Congress will not preclude the exercise of a similar power by the States, unless the power is one which, from its own nature or the manner in which it is exercised, must be lodged in a single hand. This is peculiarly true of the judicial power, which may well be concurrent in different tribunals, deriving their authority from the same or from a different government.² It is equally clear that a grant to the United States cannot enlarge the powers of the States, or confer an authority which they did not possess antecedently to the grant.

Reasoning from these premises we may infer, first, that the State courts may take cognizance of causes that were within their jurisdiction before the Constitution was adopted, unless a contrary intent appears in the grant of judicial power to the United States, or the laws passed to carry it into effect; and next, that they cannot exercise any part of the jurisdiction conferred on the General Government which would not fall within their scope independently of the grant.³

In applying these rules it is necessary to remember that

¹ *Börs v. Preston*, 111 U. S. 252; *Ames v. Kansas*, Id. 449, 469; *Gittings v. Crawford*, 1 Taney's Decisions, 1; *Graham v. Stucken*, 4 Blatch. 50.

² *Ward v. Jenkins*, 10 Metcalf, 583; *Delafield v. Illinois*, 2 Hill, N. Y. 159; *Teal v. Felton*, 1 Comstock, 537; 12 Howard, 204.

³ *Houston v. Moore*, 5 Wheaton, 1, 25, 27; *The United States v. Jones*, 109 U. S. 513, 519.

a court deriving its authority from one government may give redress or compensation for the wrongful detention or violation of a right arising under a law or grant of another government, especially where both are cognate, as in the case of the United States and the several States.¹ The State courts may accordingly take cognizance of any cause arising within the general limits of their jurisdiction, although founded upon a statute of the United States, unless the statute is so worded as to place the remedy exclusively in the courts of the Union. A bond is not less within the jurisdiction of the local tribunals because it was executed in pursuance of an act of Congress, and is conditioned for the performance of a duty which the act enjoins.² In like manner, an assignee in bankruptcy may sue in a State court, although his right to bring the action is based exclusively on a statute of the United States, and he would have no standing in court if the statute were repealed.³

¹ See *United States v. Jones*, 109 U. S. 513, 519; *Mostyn v. Fabrigas*, Cowper, 161; 1 Smith's Lead. Cas. (8th Am. ed.) 1027. See *ante*, p. 140.

² *United States v. Dodge*, 14 Johnson, 95.

³ *Ward v. Jenkins*, 10 Metcalf, 583. The Court cited and relied on the language of Chancellor Kent, 1 Comm. (3 ed.) 397, that the State courts may in the exercise of their ordinary and rightful jurisdiction incidentally take cognizance of cases arising under the Constitution and treaties of the United States. The jurisdiction in such cases rests, not on a judicial authority conferred as such by a law of Congress, but on the ordinary powers of the State courts, acting in the particular case on the legal right which had been created by the legislation of Congress. It is the duty of the State courts to give force and effect to a law of Congress as the supreme law of the land. Such a statute is law in Massachusetts, as much so as a statute enacted by her own legislature, — deriving its vitality from another source, but of equal or paramount authority. The case was not analogous to that of an assignee claiming under the laws of another State or a foreign government. There the assignee, like an executor or administrator appointed by a foreign jurisdiction, derived his authority from a source which had no force or effect where he sued; but an assignee in bankruptcy proceeded under a statute which was binding in a State tribunal as a law of the State. Unless therefore the jurisdiction of the Circuit Court had been made exclusive by Congress, the assignee might maintain the suit. And as such an intention was not explicitly stated, it might be presumed that the jurisdiction of the State courts remained unimpaired.

It has never been doubted that a title arising from a law or grant of the United States may be enforced by ejectment in a State tribunal; and while suits for the infringement of a patent are exclusively within the jurisdiction of the circuit courts of the United States, a contract of sale or license is within the cognizance of the State courts, although the subject-matter is an invention which has been patented by the United States, and the construction or operation of the patent laws may be incidentally involved.¹ Indeed, so intimately are the laws of the United States and of the several States blended, and so difficult is it, in many cases, to distinguish what part of the right or title at issue is derived from the one and what from the other, that to confine the remedy to the courts of the United States whenever a grant or law of Congress is in question would seriously impair the usefulness of the State tribunals, if it did not end in their entire suppression.

It is nevertheless a general and well-settled rule, that where a right is created by statute, and a remedy given to enforce it, the presumption is that the remedy was meant to be exclusive. It has accordingly been held that a suit for the infringement of a patent will not lie in the State courts, and can be brought only in the Circuit Court of the United States; but this depends on the language of the patent acts, and not on the operation of the Constitution of the United States.²

Three questions may arise under the foregoing head:—

1. Can a State court enforce the rights arising under the laws of the United States.

2. Have the State courts jurisdiction of an alleged or *prima facie* breach of the local law, where the defence or justification depends on the Constitution or a law of the United States?

3. Can such a court take cognizance of an offence against the United States?

The first question should obviously receive an affirmative

¹ Hartell v. Tilghman, 99 U. S. 547. See *ante*, p. 1086.

² Dudley v. Mayhew, 3 Comstock, 9.

reply. It is a general, and, where land is not concerned, universal rule, that a court which has jurisdiction over the parties may give effect to a demand which either of them has against the other, although arising under the laws of a foreign country, and one that could not have come into being under the *lex fori*. A contract made and to be performed in Paris or Canton may be a ground of recovery in England or the United States. Damages may be recovered in New York for an injury to the plaintiff's goods or person, although both parties were at the time in France, and governed by the French laws.¹

In deciding a controversy arising in another jurisdiction, the court will have regard to the law of the place where the contract was made, or the wrong committed, and may give redress for the violation of a right, or the non-fulfilment of an obligation, which the *lex fori* does not recognize. In *Buron v. Denman*,² the defendant was held liable in England for an injury inflicted on a Portuguese slave-dealer in Africa, by burning his barracoons and liberating his slaves, although a recovery could not have been had under English law had the act been done in any part of the British dominions. The rule applies *a fortiori* where the obligation is founded on consent; and an agreement for the sale and delivery of slaves in a foreign country may be enforced in a country where slavery, and any traffic in, or sale or barter of, slaves, is prohibited by law.³ So a recovery may be had in Vermont, under the statutes of New York, for money lost at play in the latter State, although no such right exists or could be maintained under the Vermont law.⁴ The court said that actions for the recovery of penalties were local, and would not lie in a foreign jurisdiction; but that an obligation to refund im-

¹ See *Mostyn v. Fabrigas*, Cowper, 161; 1 *Smith's Leading Cases*, (8 Am. ed.); *Henwood v. Cheeseman*, 3 S. & R. 500; *Atkinson v. The Railroad Co.* 2 Vroom, 309; *Robinson v. Armstrong*, 34 Maine, 145; *Hale v. Lawrence*, 1 Zabriskie, 714.

² 2 Exchequer, 166.

³ *Santos v. Illidge*, 8 C. B. (N. S.) 866.

⁴ *Flanagan v. Packard*, 41 Vt. 561.

posed by the *lex loci* was a debt, and might be recovered as such in any tribunal which obtained jurisdiction over the parties.

These decisions show that a right arising under, or conferred by, the laws of one sovereignty may be vindicated by the tribunals of another. It is by virtue of this doctrine, and because the acts of Congress are as much the laws of the State as if they were enacted by its legislature, that the State courts enforce the Constitution and statutes of the United States, subject to the controlling power of Congress, which may at any time vest the jurisdiction of such questions exclusively in the national tribunals. The principle was indicated by Hamilton in one of those articles in "The Federalist" which anticipated the working of the nascent Constitution with a sagacity that has seldom been falsified by the event. "The judiciary power," said he, "of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than those of New York, may furnish the objects of legal discussion to our courts. When, in addition to this, we consider the State governments and the national governments as they truly are, in the light of kindred systems and as parts of one whole, the inference seems to be conclusive that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited.¹ They

¹ "But this doctrine of concurrent jurisdiction is clearly applicable only to those descriptions of causes of which the State courts have previous cognizance. It is not equally evident in relation to cases which may grow out of, and be *peculiar* to, the constitution to be established; for not to allow the State courts a right of jurisdiction in such cases can hardly be considered as the abridgment of pre-existing authority. I mean not therefore to contend that the United States, in the course of legislation upon the objects entrusted to their direction, may not commit the decision of causes arising upon a particular regulation to the federal courts solely, if such a measure should be deemed expedient; but I hold that the State courts will be divested of no part of their primitive juris-

would be the natural auxiliaries of the federal courts, and an appeal would as naturally lie from them to the tribunal

diction, further than may relate to an appeal; and I am even of opinion that in every case in which they were not expressly excluded by the future acts of the national legislature, they will of course take cognizance of the causes to which those acts may give birth. This I infer from the nature of judiciary power, and from the general genius of the system. The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan, not less than of New York, may furnish the objects of legal discussion to our courts. When in addition to this we consider the State governments, and the national governments, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive, and the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it is not expressly prohibited. Here another question occurs: What relation would subsist between the national and State courts in these instances of concurrent jurisdiction? I answer that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case or the local courts must be excluded from a concurrent jurisdiction in matters of national concern; else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the national and State systems are to be regarded as *one whole*. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of national justice and the rules of national decision. The evident aim of the plan of the convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions which give appel-

which was destined to unite and assimilate the principles of national justice and the rules of national dominion." This argument was cited by Mr. Justice Bradley, in *Claffin v. Houseman*,¹ as "conclusive that the State courts have a concurrent jurisdiction in all cases arising under the laws of the Union where it is not expressly prohibited." In the *Northern Central R. R. Co. v. Scholl*,² an action was sustained in Maryland against the defendants below for the negligence of their agents in selling a passenger-ticket in Pennsylvania to a runaway slave, by which means he was enabled to escape from his master. The court said that although slavery was not recognized by the laws of the latter State, the act complained of was not the less an injury to the plaintiff's right under the Constitution and laws of the United States, for which redress might be given by any tribunal competent to adjudge such questions.

It is established in accordance with this principle that relief may be given in a State tribunal, although the right under which the plaintiff claims, or the defendant justifies, depends on the Constitution or laws of the United States. The laws of the Union are, by the express words of the Constitution, a part of the law of each State, and as binding upon its officers and people as its own constitution and laws, and must necessarily be considered and applied by the State courts in giving judgment.³ A different view would seriously embarrass, if it did not preclude, the administration of justice; because both systems are so interwoven that a cause can seldom be brought before the judiciary of either government which may not involve questions arising under the legislation

late jurisdiction to the Supreme Court to appeals from the subordinate federal courts, instead of allowing their extension to the State courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation." *Federalist*, Article 82.

¹ 93 U. S. 136.

² 16 Md. 331.

³ *The Farmers and Mechanics' Bank v. Dunning*, 91 U. S. 29; *Blitz v. The Columbia Bank*, 6 Norris, 87; *The United States v. Lathrop*, 17 Johnson, 4; *Rumpf v. The Commonwealth*, 6 Casey, 475.

of the other.¹ If the State courts could not take cognizance of the federal laws, the federal courts would for a like reason be precluded from the exercise of jurisdiction under the State laws, except for the purpose of considering whether they were contrary to, or forbidden by, the Constitution. When, for instance, suit is brought on a mortgage of a vessel, it may be necessary to inquire, first, whether the instrument under which the plaintiff claims was duly registered, and next, is the debt due and unpaid? The former question will depend on the laws of Congress, the latter on the laws of the State; and both must be taken into view in determining the right of the mortgagee. Congress may, undoubtedly, provide that questions under the legislation or authority of the United States shall be exclusively considered by the national tribunals, or for the removal of such a cause from the State courts; but where no such provision has been made, the State jurisdiction is co-extensive in civil cases with the federal, and whichever first obtains possession of the cause will hold it to the end, subject to an appeal to the Supreme Court of the United States.²

The principle is given in the following extract from the judgment in *Clafin v. Houseman*:—

“The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but is a concurrent, and within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights, and not restrained by its Constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under State laws may be prosecuted in the State courts, and also, if the parties re-

¹ See *Ex parte McNeil*, 13 Wallace, 236, 213; *Clafin v. Houseman*, 93 U. S. 136; *Blitz v. The Columbia National Bank*, 6 Norris, 87, 93.

² *Clafin v. Houseman*, 93 U. S. 130.

side in different States, in the federal courts. So rights, whether legal or equitable, acquired under the laws of United States may be prosecuted in the United States courts, or in the State courts competent to decide rights of the like character and class, — subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the federal courts exclusive jurisdiction.¹ This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced — if not provided otherwise by some act of Congress — by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief; because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. The disposition to regard the laws of the United States as emanating from a foreign jurisdiction is founded on erroneous views of the nature and relations of the State and federal governments.”

The court held, in accordance with this view, that, although the right of an assignee in bankruptcy to administer the bankrupt's debts and assets is conferred and regulated by Congress, and would cease if the act were unconditionally repealed, the suit may be brought in the State courts, which have a concurrent jurisdiction for such purposes with the federal tribunals, wherever the authority of the latter is not exclusive in terms or by a necessary implication.²

It results from these considerations that when Congress confer a right, and the act does not expressly or impliedly bestow an exclusive jurisdiction on the national tribunals,

¹ See the remarks of Mr. Justice Field in *The Moses Taylor*, 4 Wallace, 429, and Story, J., in *Martin v. Hunter's Lessee*, 1 Wheaton, 334, and of Mr. Justice Swayne, in *Ex parte McNeil*, 13 Wallace, 236.

² See *Eyster v. Gaff*, 91 U. S. 521, to the same effect.

Supreme Court has original jurisdiction in three cases belonging to the latter class, — where a State, where a foreign minister, or where a consul is a party. They have appellate jurisdiction in every case within the general grant of judicial power in the Constitution, whether it could or could not come under their original jurisdiction. The affirmative words by which original jurisdiction is conferred in the instances above-mentioned exclude the right to take such jurisdiction in any other instance ; but they do not operate as a restriction on the grant of appellate jurisdiction, or preclude a concurrent jurisdiction in the inferior courts of the United States. The circuit and district courts may accordingly take cognizance, concurrently with the Supreme Court, of suits brought by or against a consul, or where a public minister or ambassador appears in court as plaintiff ; and every such suit may be removed from a State court to the federal tribunals.¹ If suits against a foreign minister must be brought in the Supreme Court, it is from the provisions of the Judiciary Act, and not from the Constitution.

The better opinion would also seem to be that Congress may, if they think fit, confer an appellate jurisdiction on an intermediate tribunal, and require all causes arising on a writ of error to be brought there in the first instance, before going to the Supreme Court. This view was suggested in "The Federalist," No. 82, and has since received the sanction of Kent and Story in their Commentaries on Constitutional Law. It results from the words of the Constitution, which declare that the judicial power of the United States shall be vested in a Supreme Court and such inferior courts as Congress may from time to time establish, without imposing any restriction on the jurisdiction of the inferior courts.²

The rule is established on this basis by the case of *Ames v. Kansas*.³ The court there adopted the reasoning of Chief-Justice Marshall in *Cohen v. Virginia*, and held that it ap-

¹ *Davis v. Packard*, 7 Peters, 276; *Gittings v. Crawford*, 1 Taney's Decisions, 1; *Ames v. Kansas*, 111 U. S. 449, 468.

² See *Cohen v. Virginia*, 6 Wheaton, 396.

³ 111 U. S. 449.

have not been excluded by Congress. The question arose in *The State of Illinois v. Delafield*,¹ on a bill filed by the State of Illinois to have an account of certain bonds which were alleged to have been received and sold by the defendant in violation of the right of the complainant. The defendant contended that the grant of judicial power to the federal courts in cases where a State is a party, and the clause by which original jurisdiction was conferred in such instances on the Supreme Court of the United States rendered the authority of that tribunal exclusive, and precluded the exercise of a concurrent jurisdiction by the States. *Bronson, J.*, held that —

“the question was virtually decided by the words of the Judiciary Act, which declares that in suits between a State and the citizens of another State, or an alien, the jurisdiction of the Supreme Court should be original, but not exclusive; and such was manifestly the intention of the Constitution. The language by which judicial power was granted to the United States did not indicate that the framers of that instrument meant to deprive the State courts of the authority which they previously possessed. There was nothing in the nature of jurisdiction to render it exclusive in the absence of express words manifesting such a design. It was not like a grant of property, which could not have several owners at the same time. Unless the State courts had a concurrent authority, there might be a failure of justice. A large part of the judicial power of the United States had never been vested in the federal courts by the legislation of Congress. The State courts had accordingly exercised a concurrent jurisdiction with the courts of the United States from the foundation of the government, not only where those courts had jurisdiction from the character of the cause, but where they had jurisdiction from the character of the parties. It might be, as the appellant contended, that whichever way the case was decided, there could be no appeal to the Supreme Court of the United States; but this did not prove that the judicial power of the United States was exclusive. It only proved that the federal courts might fail to obtain cognizance of a cause which they could have heard and determined if the party had not selected an-

¹ 8 Page, 527; 2 Hill, 159.

other forum. There were, indeed, certain instances where the suit could only be brought in the courts of the United States. Where a State was made defendant the State courts could not exercise jurisdiction; but this was not because the Constitution had forbidden it, but because a sovereign State was suable only by virtue of the consent given to submit to the jurisdiction of the federal courts. Again, crimes were punishable only by the government against which they were committed, and the State courts could not enforce the penal laws of the United States, or of any government but their own. This rested on a general principle wholly independent of the federal Constitution.¹ There were some cases where Congress had declared the jurisdiction of the federal courts exclusive, but these were cases peculiar to, and springing out of, the laws of the United States, and not cases of which the State courts had cognizance prior to the adoption of the Constitution. There was nothing, therefore, in the Constitution to prevent a State court from taking jurisdiction of a cause in which a State voluntarily appeared as plaintiff or as defendant."

The doctrine that if Congress sanction or do not forbid, the State courts may take cognizance of controversies arising under the Constitution and laws of the United States, and even of actions against the General Government, was applied in *The United States v. Jones*² under somewhat peculiar circumstances. The claim of the plaintiff below was for the damages resulting from the flowage of his land by a dam erected by a canal company in the exercise of the right of eminent domain under a charter conferred by the legislature of Wisconsin. The United States, having succeeded to the rights and franchises of the company by purchase, became equitably liable to the plaintiff; and an act of Congress was passed authorizing the State courts to take cognizance of the case, and determine how much was due. The case was heard under the provisions of the statute, and a judgment rendered against the government, which was brought before the Supreme Court of the United States, and affirmed on the following grounds:—

¹ *United States v. Lathrop*, 17 Johnson, 4; *Scoville v. Canfield*, 14 Id. 338; *Story on Conflict of Laws* (2d ed.), 516.

² 109 U. S. 513, 519. See *ante*, p. 335.

"A proceeding for the ascertainment of the value of the property, and consequent compensation to be made, is merely an inquiry to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners, or special boards, or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion.

"Undoubtedly it was the purpose of the Constitution to establish a General Government independent of, and in some respects superior to, the jurisdiction of the State government, — one which could enforce its own laws through its own officers and tribunals; and this purpose was accomplished. That government can create all the officers and tribunals required for the execution of its powers. Upon this point there can be no question.¹ Yet from the time of its establishment that government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents. Their use has not been deemed a violation of any principle, or as in any manner derogating from the sovereign authority of the federal government, but as a matter of convenience and a great saving of expense.

"The use of the courts of the State in applying the rules of naturalization prescribed by Congress, the exercise at one time by State justices of the power of committing magistrates for violations of the federal law, and the use of State penitentiaries for the confinement of convicts under such laws, are instances of the employment of State tribunals and such institutions in the execution of powers of the General Government. At different times various duties have been imposed by acts of Congress on State tribunals. They have been invested with jurisdiction in civil suits, and over complaints and prosecutions for fines, penalties, and forfeitures arising under laws of the United States.²

"The jurisdiction thus conferred could not be enforced against the consent of the States, but when its exercise was not incompat-

¹ *Kohl v. United States*, 91 U. S. 367.

² 1 Kent, 400.

ible with State duties, and the State made no objection to it, the decisions rendered by the State tribunals were upheld. Whatever questions might arise out of such a delegation of authority under other circumstances, we can see none where the inquiry relates to an incidental fact, not involving in its ascertainment the exercise of any sovereign attribute. Almost, if not quite, from the first year of its existence it has been the practice of the General Government, when necessary to take private property for public uses, to resort to State boards and tribunals to ascertain the value of the property, and hence the compensation to be made.¹

It followed that the courts of Wisconsin might well take cognizance under the authority conferred by Congress.

¹ Burt v. Merchants' Insurance Co., 106 Mass. 356; United States v. Jones, 109 U. S. 519.

LECTURE LV.

A Trespass committed by a Federal Officer is a Violation of the State Laws, and not of the Laws of the United States, although he may be acting Officially, and under Color of a Judicial Writ or an Act of Congress. — An Action will lie in a State Court against the Marshal for arresting A under a Writ against B, or levying on his Goods; and so of the Seizure of a Vessel by a Collector of the Customs under an Illegal Order from the President. — Things or Persons held, though illegally, for the Government cannot be taken out of the Hands of its Officers by a Replevin, or *Habeas Corpus*, from a State Court, unless the Authority relied on is a Pretence, or used as a Cover for a Private Wrong. — The Marshal cannot levy on Goods attached by Sheriff. — If the Court has Jurisdiction of the Cause and the Parties, the Judgment cannot be set aside because the Suit or Prosecution is founded on an Unconstitutional Statute.

THE answer to the first question, suggested in the previous chapter, also solves the second. If the State courts can enforce a right arising under the laws of the United States, they may pass judgment on the validity of such a right when it is set up as a defence.

It is an established principle that when a court of general and common-law powers takes cognizance of a cause for any purpose, it will have jurisdiction of the cause for all purposes, and may hear and determine every point which arises in the course of the investigation. There is nothing in the relations of the State and federal courts to take suits brought for injuries inflicted by an officer or agent of the United States out of the rule.¹ An act causing a deprivation of liberty or

¹ *Slocum v Mayberry*, 2 Wheaton, 1; *Teall v. Felton*, 1 Comstock, 537; 12 Howard, 281.

property, or which is prejudicial to the public health or morals is, save exceptionally, an offence against the State laws, with which the courts of the United States have no concern; and if the local courts could not intervene, the injury would go unredressed.¹

It does not necessarily vary the case, or put it beyond the reach of the State courts, unless Congress so provide, that the defendant is an officer of the United States, and justifies under a writ of a federal tribunal or an act of Congress. The power to protect the citizen in the enjoyment of his life, liberty, and property is lodged in the States, and not in the General Government; to that power and to the laws made under it he must look for redress when his person or property is assailed; and the federal courts cannot, speaking generally, administer those laws, or give him aid unless the case is, from the character of the parties, within the grant of judicial power to the United States.²

The right to redress when a public officer takes property or persons under color of an authority which has not been conferred, or is unconstitutional and therefore in contemplation of law does not exist, was tested and defined in *Poindexter v. Greenhow*.³ The case there grew out of the taking of the plaintiff's furniture as a distraint for taxes, that had been tendered in coupons which Virginia had, by an act of March 30, 1871, agreed to receive in payment for such dues. He brought detinue in the Circuit Court of the United States for the recovery of the specific goods; and the defence was that the statute of 1871 had been repealed by an act which forbade the State revenue officers to accept anything but gold, silver, and United States treasury notes. The Supreme Court held that the plaintiff's case was plain. "He had paid the taxes demanded of him by a lawful tender. The defendant had no authority thereafter to attempt to enforce other payment by seizing his property. In doing so he ceased to

¹ Civil Rights Cases, 15 U. S. 3, 6, 15; *The United States v. Harris*, 106 Id. 639; *The United States v. Cruikshank*, 92 Id. 542; *Gibbons v. Ogden*, 9 Wheaton, 203. See *ante*, pp. 533, 536.

² See *ante*, p. 533.

³ 114 U. S. 270, 294. See *ante*, p. 897.

be an officer of the law, and became a private wrong-doer. It was the simple case of a private person who unlawfully, with force and arms, seizes, takes, and detains the personal property of another." That an action of detinue would lie under such circumstances according to the law of Virginia, had not been questioned. The right of recovery seemed to be complete unless a defence could be made on the ground that, as the State was interested in the controversy, the suit was virtually against it, and could not be maintained consistently with the Eleventh Amendment. This argument had been overruled in *Osborn v. The Bank of the United States*,¹ where Chief-Justice Marshall observed : —

"Suppose that while a controversy as to boundary is pending between two States, a collecting officer for one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks for redress in the federal court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted that in such a case the action would lie, because the officer might be treated as a trespasser ; and the verdict and a judgment against him would not act directly on the property of the State. That it would not so act may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and on the State's proceeding against him may plead in bar the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State in the hands of its officers. And yet the argument admits that the action in such a case would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in the possession of the seizing officer. It being admitted in argument that an action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it should the seizure be deemed unlawful."

¹ 9 Wheaton, 738-853.

This conclusion is borne out by the English decisions, which establish that an agent is not less answerable in damages for an injurious act because his principal is beyond or above the reach of process, and that the rule holds good even when the principal's exemption is due to his dignity or character as a sovereign. The main ground taken in *Poindexter v. Greenhow* was, however, that a State or the General Government cannot give an unconstitutional command, and that an agent who relies on such a mandate is in effect a principal.

The rule laid down in these cases with regard to suits in the federal courts against a State officer applies, with an exception hereafter noted, where the wrong-doer is an officer or agent of the General Government, and the sufferer proceeds in a State tribunal. In both instances the defendant is charged as a trespasser, and not in his official capacity; the suit is against him, and not against the sovereignty which he misrepresents. The State law is violated, and not the law of the United States; and if the circumstance that the case involves a federal question gives the United States courts jurisdiction, it is concurrent, and does not necessarily exclude the State tribunals.¹ In *Poindexter v. Greenhow*, the United States Circuit Court had cognizance because the wrong was done under an act of the State legislature which not only impaired the obligation of a contract, but caused the deprivation which the Fourteenth Amendment forbids; while, in *Osborn v. The Bank of the United States*, the character of the plaintiff as a corporation chartered by the Government brought the case within the grant of judicial power to the United States, and but for these reasons the suit not only might, but must have been brought in the State tribunals. If this cannot be said of *The United States v. Lee*,² it is because the suit was specifically for the recovery of the land, and not to obtain compensation in damages.³

¹ See *Slocum v. Mayberry*, 2 Wheaton, 1; *Teall v. Felton*, 1 Comstock, 537, 543; *Buck v. Colbath*, 3 Wallace, 334, 342.

² 106 U. S.

³ *Hagan v. Lucas*, 10 Peters, 400; *Peck v. Jenness*, 7 Howard, 624; *Days v. Gallup*, 2 Wallace, 97; *Buck v. Colbath*, 3 Wallace, 343.

Reasoning from these premises we shall arrive at the conclusion that a recovery may be had in a State tribunal wherever the local laws are violated in obedience to an injurious or unconstitutional mandate from the General Government, and there is no clause in the Constitution or in the acts of Congress rendering the jurisdiction of the federal courts exclusive. Such in effect was the rule laid down at the outset of the government, and that still prevails, although it has been to some extent restricted by the recent course of decision. Compensation may, consequently, be obtained in a State tribunal for the seizure of a vessel or other chattel in obedience to an illegal command of the President, or under an erroneous interpretation of an act of Congress, although the defendant was acting on behalf of the United States, and, as he believed, in the discharge of his official duty.¹ In *Gelston v. Hoyt* it was held not to be a good plea to an action in a New York court for the asportation of a vessel that the defendants were the collector and surveyor of the customs of the port, and took the ship as forfeited to the United States in obedience to an order given by the President under the provisions of an act of Congress, because it appeared as matter of law that the President exceeded the authority conferred by the act in issuing the command. In like manner a recovery may be had in a State court against a collector of the revenue for the seizure of a ship after the termination of the voyage under a statute authorizing such a taking while the voyage continues;² and a ratification by the President will not operate as a defence. So trover was maintained in a local court in *Teal v. Felton* against a postmaster for withholding a newspaper which had been sent through the mail to the plaintiff, although he acted under an order from the Postmaster-General.

It does not vary the legal aspect of the case, or preclude the State tribunals, that the injury complained of was inflicted by an officer of the army or navy on a man under his

¹ *Teall v. Felton*, 1 Comstock, 537; 12 Howard, 284; *Slocum v. Mayberry*, 2 Wheaton, 1; *Gelston v. Hoyt*, 3 Id. 247.

² *Otis v. Bacon*, 7 Cranch, 589.

command, and the defendant relies on the Articles of War for his justification.¹ "For a malicious exercise, by a military officer, of lawful authority,² or for acts of a military officer or court in excess of authority, though done in good faith toward persons in the military service, and *a fortiori* toward persons who are not, where the civil laws are in full force, the person injured may obtain redress in the ordinary way, by suit against the wrong-doer."³ In the words of Lord Chief-Justice Wilmot, "If a man be treated as a soldier, who is not duly listed or subject to military discipline, he has his action."⁴

In *Slocum v. Mayberry*⁵ the plaintiff in error was surveyor of the customs for the port of Newport, R. I., and in that capacity seized a vessel, with the cargo on board, under the directions of the collector of the port, for an alleged intention to violate the embargo which had been laid by Congress. The owner of the cargo brought an action of replevin in the State court, which gave judgment in his favor; and a writ of error was taken to the Supreme Court of the United States. The plaintiff in error contended that the seizure was valid under the eleventh section of the act of April 26, 1808, and

¹ *Wise v. Withers*, 3 Cranch, 337; *Wilson v. McKenzie*, 7 Hill, 95, 99; *Wilkes v. Dinsman*, 7 Howard, 89; 12 Id. 404; *Dynes v. Hoover*, 20 Id. 65, 88; *Luther v. Borden*, 7 Id. 46, 63; *Tyler v. Pomeroy*, 8 Allen, 480, 481; 1 Smith's Lead. Cas. (8 Am. ed.) 1127. See *ante*, p. 915.

² *Wall v. McNamara*, cited in 1 T. R. 502, 536; *Governor Wall's Case*, 28 Howell's State Trials, 144, 176; *Luther v. Borden*, 7 Howard, 46; *Dinsman v. Wilkes*, 12 Howard, 403, 405.

³ "Frye v. Ogle, reported in the London Magazine for 1746, pp. 124, 125, 576, 577; stated in Prendergast's Law of Army Officers, 130-132, and in 1 McArthur on Courts Martial, 229, 344, and cited in 4 Taunt. 76, 87; *Comyn v. Sabine*, cited in Cowper, 169, 175, 176; *Swinton v. Molloy*, cited in 1 T. R. 537; *Warden v. Bailey*, 4 Taunt. 67; reversed in *Bailey v. Warden*, 4 M. & S. 400, only on the ground that the act complained of was in one view within the scope of the defendant's military authority; *Wolton v. Gavin*, 16 Q. B. 52, 62, 70, 79; *Wise v. Withers*, 3 Cranch, 337; *Ex parte Watkins*, 3 Peters, 208; *Dynes v. Hoover*, 20 Howard, 80, 81; *Fisher v. McGirr*, 1 Gray, 45; Massachusetts Declaration of Rights, art. 28; *Wilson v. McKenzie*, 7 Hill (N. Y.), 95;" *Tyler v. Pomeroy*, 8 Allen, 485.

⁴ *Wilmot*, 85, 86, note.

⁵ 2 Wheaton, 1.

that, even if it was not, the case fell within the grant of admiralty jurisdiction, and a State court could not interpose or stay the proceeding by its process. In delivering judgment, Chief-Justice Marshall said that —

“the authority given by Congress related only to the vessel, and did not authorize the detention of the cargo, which was withheld from the owner contrary to law. He had, therefore, the same right to it as to his other property, and might appeal to the tribunals of his country for relief. The courts of the United States had no general or common-law jurisdiction in such cases; and if the plaintiff could not proceed in the local tribunals, the wrong would be without a remedy. Congress had not empowered the tribunals of the General Government to decide on the conduct of its officers, in the execution of its laws, until the case should have passed through the State courts and received judgment at their hands. Had the cargo been seized under an authority conferred by Congress with a view to a judicial proceeding in the admiralty, it could not have been withdrawn by process emanating from any other source. But as the matter stood, the only tribunal in which the plaintiff could obtain redress was the Supreme Court of Rhode Island; and as the plea filed in that court showed no legal right to detain the plaintiff's goods, there was no reason why the judgment which had been rendered in his favor should be reversed.”¹

¹ For like reasons it was held not to be a good plea to an action of replevin against the marshal, either in a State or national tribunal, that he took the ship in question under a judgment rendered by the Circuit Court in favor of the United States, unless it is also averred that the ship belonged to the defendant in the judgment, or was not the property of the plaintiff in the replevin. *Bruen v. Ogden*, 6 Halstead, 370. The State courts had jurisdiction in such cases prior to the adoption of the Constitution, and their authority must continue to exist unless divested by the delegation of judicial power to the courts of the United States. This grant was not exclusive or prohibitory, and the act passed to carry it into effect implied that the jurisdiction of the State courts remained intact. By the twenty-fifth section of the act of 1789, the judgment of a State court in any cause where a treaty or statute of, or authority exercised under, the United States was drawn in question, and the decision was against their validity, might be removed on error to the Supreme Court of the United States; which necessarily presupposed that the State courts might in the first instance examine and decide controversies arising under the laws and Constitution of the United States.

Although the above judgment was in accordance with the generally received opinion when pronounced, the jurisdiction of the State courts to entertain an action of replevin for the recovery of goods, or issue a writ of *habeas corpus* to liberate persons taken or detained under an authority from the United States, has since been questioned, and agreeably to the recent decisions cannot be exercised when the effect will be to deprive the defendant of a possession which he holds under an authority given by the government, and may be unable to regain whether the cause is or is not determined in his favor. Such by general consent is now the rule when a levy or seizure is made under judicial process, because the property is virtually in the custody of the court which issued the writ, and must await its decision.¹

“It is a doctrine of law too long established to require a citation of authorities that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, — being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process; for this would produce a conflict extremely embarrassing to the administration of justice. In the case of *Kennedy v. The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the parties before

¹ *Howe v. Freeman*, 20 Howard, 583; *Buck v. Colbath*, 3 Wallace, 327, 341.

the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum. The act of Congress of March 2, 1793, chap. 66, section 5, declares that a writ of injunction shall not be granted 'to stay proceedings in any court of a State.' In the case of *Diggs v. Wolcott*,¹ the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a State court, and this court reversed the decree because it had no jurisdiction to enjoin proceedings in State courts."²

The point decided in this case was that the jurisdiction of the State courts to enforce a lien given by the local law could not be ousted by the subsequent institution of proceedings in bankruptcy in the District Court of the United States, and that the latter court could not make or enforce any order tending to such an end; but the principle has a much wider scope, and precludes an attempt on the part of any court, whether State or federal, to adopt a course that will hamper the jurisdiction of a co-ordinate tribunal, or prevent it from giving effect to a writ which it has issued in the pursuance of the authority conferred by the legislature. If the officer who is charged with the execution of a *capias* or *feri facias* takes the wrong thing or person, he may be made personally responsible in any court which has jurisdiction of such causes of action; but the question what shall be done with the man or chattel belongs exclusively to the court which gave the order.

Whether property which has been taken in execution does or does not belong to the defendant, it cannot be withdrawn from the hands of the marshal or sheriff by another tribunal.³ In *Howe v. Freeman*, the marshal levied on the property of A, under an attachment against B, and it was held, reversing the judgment of the Supreme Court of Massachusetts, that the rightful owner could not regain the possession of his goods

¹ 4 Cranch, 179.

² *Peck v. Jenness*, 7 Howard, 624.

³ *Howe v. Freeman*, 14 Gray, 566; 20 Howard, 583; *Buck v. Colbath*, 3 Wallace, 334, 346; *Covell v. Hayman*, 111 U. S. 176.

through the intervention of a State court, or any tribunal except that which issued the writ, and was entitled to the exclusive control of its own process. Although this conclusion was contrary to the generally received opinion as given in Kent's Commentaries,¹ and took the profession by surprise, it is now generally accepted. Such cases do not, as the court below supposed, fall within the rule laid down in *Slocum v. Mayberry*, because the act is done under judicial process, and because the mistake of the officer is not as to the existence and extent of his authority, but in applying it to the facts. Were the marshal to take the defendant into custody under an order to levy on his goods, a different question would be presented, and the prisoner might perhaps be discharged collaterally by a *habeas corpus*. The judgment in *Howe v. Freeman* was reviewed soon afterwards in *Buck v. Colbath*,² when the court took occasion to declare that they were —

“entirely satisfied with it, and with the principle upon which it is founded, — a principle which is essential to the dignity and just authority of every court, and to the comity which should regulate the relations between all courts of concurrent jurisdiction. That principle is, that whenever property has been seized by an officer of the court, by virtue of its process, the property is to be considered as in the custody of the court, and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. This is the principle upon which the decision of this court rested in *Taylor v. Carryl*,³ and *Hagan v. Lucas*,⁴ both of which assert substantially the same doctrine. A departure from this rule would lead to the utmost confusion, and to endless strife between courts of concurrent jurisdiction, deriving their powers from the same source; but how much more disastrous would be the consequences of such a course in the conflict of jurisdiction between courts whose powers are derived from entirely different sources, while their jurisdiction is concurrent as to the parties and the subject-matter of the suit.

¹ Vol. i. p. 410.

² 8 Wallace, 327, 341.

³ 20 Howard, 583.

⁴ 10 Peters, 400.

"This principle, however, has its limitations, or rather, its just definition is to be attended to. It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. The effect to be given in such cases to the adjudications of the court first possessed of the property, depends upon principles familiar to the law, but no contest arises about the mere possession, and no conflict but such as may be decided without unseemly and discreditable collisions.

"It is upon this ground that the court, in *Day v. Gallup*, held that this court had no jurisdiction of that case. The property attached had been sold, and the attachment suit ended, when the attaching officer and his assistants were sued; and we held that such a suit in the State court, commenced after the proceedings in the federal court had been concluded, raised no question for the jurisdiction of this court. It is obvious that the action of trespass against the marshal, in the case before us, does not interfere with the principle thus laid down and limited. The federal court could proceed to render its judgment in the attachment suit, could sell and deliver the property attached, and have its execution satisfied, without any disturbance of its proceedings, or any contempt of its process, while at the same time the State court could proceed to determine the questions before it, involved in the suit against the marshal, without interfering with the possession of the property in dispute."

As the language held in the above instance shows, all courts are within the principle as regards cases coming under their jurisdiction, and it can no more be disregarded by the courts of the United States than by a State tribunal. Things which have been levied on under a writ issued by a State court cannot, therefore, be taken from the officer by a proceeding instituted in a federal court, or in any tribunal except that to which he is directly answerable.¹ They are, moreover, from the moment at which the levy is made, in

¹ *Hagan v. Lucas*, 10 Peters, 400; *Peck v. Jenness*, 7 Howard, 624.

the custody of the law, and cannot be subjected to any writ or process which is at variance with the purpose for which the execution was issued.¹ When the sheriff has levied, and other writs are subsequently placed in his hands, he may proceed to a sale under all, and distribute the proceeds among the respective claimants according to priority; and so of a levy and sale by a marshal under successive executions from a circuit or district court of the United States. But the marshal cannot levy upon property which has already been taken in execution by the sheriff, nor can the sheriff adopt such a course relatively to the marshal. Such a course would give rise to a conflict of jurisdiction that might seriously impede the administration of justice.² The rule applies so long as the goods are subject to the control of the court, for the purposes of the suit, whether they are or are not held by the officer. In *Hagan v. Lucas*, chattels which had been levied on as the property of the defendant in the writ were delivered to a third person who claimed them as his own under a forthcoming or interpleader bond; and it was held that his custody was substituted for that of the sheriff, and that it was still in the keeping of the law, and could not be taken in execution by the marshal. In *Taylor v. Carryl*,³ goods which had been taken by the sheriff under a writ of foreign attachment were sold as perishable; and it was decided that the purchaser acquired a valid title as against a claimant under a proceeding in the admiralty which was not instituted until after the State court had obtained jurisdiction through the levy made by the sheriff. The court held that property seized by the sheriff under the process of attachment from the State court, and while in the custody of the officer, could not be levied on or taken from him by process from the District Court of the United States. An attempt by the marshal to seize it, through a notice or otherwise, was a nullity, and gave the court no jurisdiction. To give jurisdiction in

¹ *Taylor v. Carryl*, 20 Howard, 594.

² *Hagan v. Lucas*, 10 Peters, 400, 403.

³ 12 Harris, 259; 20 Howard, 583. See *ante*, p. 1018.

a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under the process.

The principle is applicable to persons, and even more important where they are concerned than as regards property. If a man who has been committed and is held for trial could be withdrawn from the custody of the appropriate tribunal by a writ issued from another court, the course of criminal procedure might be indefinitely delayed and the claims of justice frustrated. It is immaterial that the statute which the prisoner is charged with violating is alleged to be unconstitutional, because the authority of the court to determine his guilt or innocence is derived from the law which called it into being, and exists whether the law which it is required to enforce or administer is or is not valid.

In *Passmore Williamson's Case*,¹ the Supreme Court of Pennsylvania refused to issue a *habeas corpus* for the body of the petitioner who had been committed for a contempt of court, in a proceeding under the Fugitive Slave Law of the United States. Black, J., said:—

“If the law under which the federal court proceeded was unconstitutional, any judgment that might be pronounced under it would be equally invalid with the law. A void judgment was to be regarded as no judgment, and every judgment was void which clearly appeared to have been pronounced by a court having no jurisdiction over the subject-matter. Were a federal court to try and sentence a citizen for a libel, or were a State court whose jurisdiction was confined to civil pleas to entertain an indictment for a crime and convict the accused, the judgment would in either case be merely void. When, however, a case fell within the general jurisdiction of a tribunal, it was bound to hear and determine the case according to law. A multitude of questions might arise during the proceedings, and among them, whether the statute which the accused was charged with violating was constitutional. But this would not deprive the court of jurisdiction. It would still be the duty of the judges to proceed with the investigation until it was concluded; and they might, for the purpose of so doing, exercise an authority in the premises which could not be challenged collaterally.”

¹ 2 Casey, 1.

This decision was followed by another which, coming from the Supreme Court of the United States, rendered the rule indisputable. Both cases grew out of the Fugitive Slave Law, which, though intended to guard Southern rights, contributed to evoke the passions which led to civil war and the abolition of slavery. It was followed by a close hunt for persons who had fled from "labor" of their own accord, or at the instigation of emissaries who were believed to be sowing the seeds of discontent and insurrection through the plantations. Men who had been domiciled for many years at the North, and were believed by their friends not to belong to a master, or at all events not to him by whom they were claimed, were taken from their families and returned to slavery after a summary investigation which could hardly be regarded as the due process of law guaranteed by the Fifth Amendment. Such a spectacle appealed to the best instincts of our nature, and not only the party which was for emancipation at any cost, but many who did not share their views, held that the act was unconstitutional and could not rightfully be enforced by the courts. It was as sincerely felt by others that the only security for the Union lay in a close observance of the federal bond; if that was violated, incalculable mischief would ensue. The currents of political feeling were temporarily reversed, and the party which had generally upheld was now disposed to narrow the jurisdiction of the federal courts. The question came to an issue in *Abelman v. Booth*,¹ and was decided in favor of the United States on grounds which are independent of the validity of the Fugitive Slave Law, and equally conclusive whether it could or could not constitutionally be passed by Congress.

The controversy arose out of the commitment and conviction of Booth, by the United States District Court, under an indictment for an offence in violating the Fugitive Slave Law. A *habeas corpus* was thereupon issued by the Supreme Court of Wisconsin, and an order given for his discharge on the assumption that the law transgressed the limits of the Constitution, and no man was punishable for resisting its

¹ 21 Howard, 506.

provisions. It was conceded that such intervention is inadmissible where a prisoner is held under the sentence of a tribunal having jurisdiction of the cause; but it was contended that the statute under consideration was merely void, and no proceedings instituted to carry it into effect could be valid. The Wisconsin court, therefore, not only sustained the action of one of its justices in discharging a man who had been committed by a United States Commissioner for aiding and abetting the escape of a fugitive slave from the deputy-marshal who had him in charge, under a warrant issued by the district judge of the United States, but liberated him from the prison to which he had been subsequently sentenced by the District Court of the United States, after trial and conviction, and directed its clerk to refuse obedience to a writ of error issued to bring up the decision for review. No pretension could well be more unfounded, or have a greater tendency to disturb the order which is essential to the administration of justice. It was unhesitatingly overruled by the Supreme Court of the United States, and the prisoner remanded to serve out his term. The sentence had been pronounced in a case arising under the laws of the United States, and was directly within the grant of judicial power of the General Government. It was imposed by a court constituted by Congress to carry the grant into effect, and could not be set aside by a State court, or by any tribunal short of the national court of last resort. There is a material difference between the question whether the statute which creates the offence is constitutional, and the question whether the offence is within the jurisdiction of the court by which the offender is tried and sentenced. The former objection does not affect the authority of the court, and will, therefore, like every other concerning the guilt or innocence of the accused, be concluded by the sentence so long as it is standing and unreversed. If the latter is valid the sentence is null, and the accused may be liberated by the Supreme Court of the United States on a *habeas corpus*.¹

¹ See 1 Smith's Lead. Cas. (8 Am. ed.) 1111; *Bradley v. Fisher*, 13 Wallace, 335, 352. See *ante*, p. 1162.

As was observed by Chief-Justice Black in *Passmore Williamson's Case*, a judgment manifestly without jurisdiction is *coram non judice* and void, and cannot be relied on as a defence or justification.¹ Such seemingly would be the case were a circuit court of the United States to take cognizance of a homicide committed in Pennsylvania, unless the act was averred and proved to have been done in some place which had been ceded by the State to the General Government.² Whether recourse must be had under such circumstances to a federal, or relief may be given by a State tribunal, seems to be an open question, which did not arise in *Abelman v. Booth*.

The doctrine that a thing or person held for adjudication under an authority conferred by law, cannot be taken out of the hands of the proper officer, applies whether the tribunal which has taken cognizance of, or is to determine the cause be military or civil. It is therefore a good return to a *habeas corpus* that the prisoner is held as a deserter from the service of the United States, because he must await the judgment of the court-martial which will presumably be convened to decide the cause. Whether the federal courts may discharge in such cases, on the ground that the relator is under age, or was not mustered into the service, does not appear; but it seems that a State court will be bound by the return, unless it is manifestly fraudulent or evasive.³ "There is," said Gibson, J., in *The Commonwealth v. Gamble*, "another ground on which the person whose liberation is requested must be remanded. It appears from the return to the writ of *habeas corpus* that he is in confinement upon a charge of desertion from his post, and the law is clear that he must abide the sentence of a court-martial before he can contest the validity of his enlistment."

In the above instances, the question arose out of the execution of judicial process, and an arbitrary seizure or arrest

¹ See *Bradley v. Fisher*, 13 Wallace, 335, 352.

² See *ante*, p. 1142.

³ See *The Commonwealth v. Gamble*, 11 S. & R. 93; *Shirk's Case*, 3 Grant, 460; 5 Philadelphia, 369.

by an officer or agent of the United States, acting ministerially, will not necessarily render his possession that of the government which he affects to represent, or preclude the State courts from liberating the prisoner or restoring the goods.¹

Jurisdiction may nevertheless attach and be exclusive without a judicial writ or a warrant from a magistrate. Every government may provide what steps shall be requisite to bring a case within the cognizance of its tribunals, and a taking on the high seas or by a collector of the revenue may be as effectual for this end as a *capias* or summons. It is enough that the seizure is duly made, and will result in bringing the property before a competent tribunal for adjudication. The federal courts have by the judiciary act exclusive cognizance of all seizures under the laws of the United States, by land or water; and if the officer who has the property in his keeping fails to institute proceedings to ascertain the forfeiture, the District Court may proceed to an adjudication at the owner's instance, or that of any party in interest who is aggrieved.²

It follows that any intervention on the part of a State that will obstruct the exercise of this jurisdiction by taking the thing seized out of the officer's possession is unwarrantable, and the federal court may enforce a re-delivery by attachment or other summary process.³ Goods that have arrived in port and have not yet passed through the custom-house are within this principle, because they are constructively in the custody of the United States, and may be so held until their nature, value, and the duties can be ascertained and paid. They cannot therefore be levied on or taken in execution by the sheriff, or, as we may infer, the marshal, at the suit of an individual, or for the purpose of carrying a judgment *in personam* into effect.⁴ A merely

¹ Taylor v. Carryl, 24 Pa. 299; 20 Howard, 583; Slocum v. Mayberry, 2 Wheaton, 1.

² See *post*, p. 1206, note.

³ Gelston v. Hoyt, 3 Wheaton, 246, 312; Slocum v. Mayberry, 2 Id. 1.

⁴ Harris v. Dennie, 3 Peters, 292.

courts to take cognizance of suits instituted for property in possession of an officer of the United States not detained under some law of the United States; consequently, their jurisdiction remains. Had this action been brought for the vessel instead of the cargo, the case would have been essentially different. The detention would have been by virtue of an act of Congress, and the jurisdiction of a State court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the State court."

himself to be aggrieved, other than such as might be obtained in a court of admiralty, could be prosecuted only in the State court. The common-law tribunals of the United States are closed against such applications, were the party disposed to make them. Congress has refused to the courts of the Union the power of deciding on the conduct of their officers in the execution of their laws, in suits at common law, until the case shall have passed through the State courts, and have received the form which may there be given it. This, however, being an action which takes the thing itself out of the possession of the officer, could certainly not be maintained in a State court, if, by the act of Congress, it was seized for the purpose of being proceeded against in the federal court.

"A very brief examination of the act of Congress will be sufficient for the inquiry whether this cargo was so seized. The second section of the act, pleaded by the defendant in the original action, only withholds a clearance from a vessel which has committed the offence described in that section. This seizure was made under the eleventh section, which enacts that 'the collectors of the customs be, and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon.'

"The authority given respects the vessel only. The cargo is in no manner the object of the act. It is arrested in its course to any other port by the detention of the vehicle in which it was to be carried; but no right is given to seize it specifically, or to detain it if separated from that vehicle. It remains in custody of the officer, simply because it is placed in a vessel which is in his custody; but no law forbids it to be taken out of that vessel, if such be the will of the owner. The cargoes thus arrested and detained were generally of a perishable nature, and it would have been wanton oppression to expose them to loss by unlimited detention, in a case where the owner was willing to remove all danger of exportation. . . . This being the true construction of the act of Congress, the owner has the same right to his cargo that he has to any other property, and may exercise over it every act of ownership not prohibited by law. He may, consequently, demand it from the officer in whose possession it is, that officer having no legal right to withhold it from him; and if it be withheld, he has a consequent right to appeal to the laws of his country for relief.

"To what court can this appeal be made? The common-law courts of the United States have no jurisdiction in the case. They can afford him no relief. The party might, indeed, institute a suit for redress in the District Court acting as an admiralty and revenue court; and such court might award restitution of the property unlawfully detained. But the act of Congress neither expressly nor by implication forbids the State

The jurisdiction was vindicated in these instances, and in Lockington's Case,¹ on the ground that an invasion of the right of personal liberty is *prima facie* a violation of the laws of the State where the wrong is done, which may be remedied by the State courts through a *habeas corpus* or other appropriate writ. That an act of Congress is relied on as a justification does not vary the case, because it is an established principle that jurisdiction once acquired extends to the determination of every question which may arise in the consideration of the cause under the statutes of the same or another government. Such was the view taken in Lockington's Case, where Tilghman, Ch.-J., observed that the authority of the State courts in cases of *habeas corpus* emanated from the several States, and not from the United States. In order to defeat this right it was necessary to show that Congress not only possessed, but had exercised, the power to take away the jurisdiction which those courts possessed anterior to the adoption of the Constitution. It was as important to the citizen to be released from an unlawful restraint under color of an authority derived from the United States, as from an illegal restraint imposed in any other way. It might be doubted whether any part of this power had been surrendered by the States; but if it had, the State courts might still exercise it until the jurisdiction of the federal judiciary was made exclusive. A like view was taken by the Supreme Court of New York in Charlton's Case, and the argument would seem to be conclusive unless an answer can be found in the political considerations which were relied on in Tarble's Case.²

ter of Stacy, 10 Johnson, 328; Charlton's Case, 7 Cowen, 471; Commonwealth v. Wright, 3 Grant, 437; Commonwealth v. Gane, Id. 447; Commonwealth v. Fox, 7 Pa. 336; Kneedler v. Lane, 45 Id. 238, 337. See The United States v. Wyngall, 5 Hill, 16, where the government was so far from questioning the jurisdiction that it brought the question whether an alien could be mustered into the service of the United States by a *certiorari* before the Supreme Court of New York, which refused to discharge the recruit because he had bound himself, and the government might waive the objection.

¹ Charlton's Case, 7 Cowen, 471; Wharton's Digest, — title *Habeas Corpus*.

² 13 Wallace, 397, 411.

These decisions, like the cognate question arising under the writ of replevin, have been qualified if not overruled; and it is now so established, that a State court cannot issue any process tending to suspend the execution of an act of Congress, or take goods or persons that have been seized by a federal officer under an authority from the General Government.¹ In *Tarble's Case* a minor was mustered into the service of the United States, contrary to the acts of Congress for the regulation of the service; and it was held that the question whether he could be lawfully detained could not be tested by a writ of *habeas corpus* from a State tribunal. The material inquiry was said to be, "Have the State courts power to discharge persons held under the authority, or claim, or color of authority from the United States, by an officer of that government?" This question admitted of but one reply, in view of the object of the Constitution, which, as defined by Chief-Justice Taney in *Ableman v. Booth*, was not only to guard against danger from abroad, but to secure union and harmony at home, by such a subordination of the States as would prevent a conflict of jurisdiction that would prove fatal to both governments. The United States were empowered by the Constitution to raise and support armies, and to provide for rules for the government of the land and naval forces; and those powers would be hampered and rendered inefficient if soldiers could be taken from the army of the United States, and perhaps discharged, on a writ of *habeas corpus* by any judge of the numerous State courts authorized to issue such writs who thought the enlistment invalid, or questioned the constitutionality of the act of Congress.²

¹ *Freeman v. Howe*, 24 Howard, 450; *Tarble's Case*, 13 Wallace, 397; *Covell v. Hayman*, 111 U. S. 178; *Patterson, The United States and The States*, p. 237.

² "The Constitution was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General Government; and that in the sphere of action assigned to it it should be supreme. and

The principle, as the judgment in *Tarble's Case* indicates, is affected by considerations which are not always the same,

strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration." *Ableman v. Booth*, 21 Howard, 506.

"Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the national government to preserve its rightful supremacy in cases of conflict of authority. In their laws and mode of enforcement neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution, and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

"Now, among the powers assigned to the national government is the power 'to raise and support armies,' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties, and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the national government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency of, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of *habeas corpus* on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the national troops without their commanders being subjected to constant annoyance and embarrassment

and cannot readily be stated. Seen in one aspect, it is a rule of policy intended to secure the government of the

from this source. The experience of the late Rebellion has shown us that in times of great popular excitement there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of *habeas corpus* for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be used, to the great detriment of the public service. In many exigencies the measures of the national government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on *habeas corpus* are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the national government could not be exercised with energy and efficiency at all times if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty. It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the national legislature.

"State judges and State courts, authorized by laws of their States to issue the writ of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders under which the prisoner is held should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer in good faith, under the authority, or

United States from being controlled or fettered by the State courts through its officers or agents. So regarded, it is a restraint only on these courts, and is not ordinarily applicable to the federal tribunals. In another aspect, it is a rule common to all courts that things which are held under judicial process, or with a view to a decision in due course of law, shall not be levied on, or taken under a writ from any tribunal save that to which the decision of the controversy properly belongs, and applies whether the power relied on as a justification could or could not constitutionally be conferred, or although it was not rightfully exercised. It should not be so applied as to cover any act which is necessarily beyond the scope of the power. A return to a *habeas corpus* from a State court that the person on whose behalf the writ was issued was drafted under an act of Congress, and is held to answer a charge of desertion, or for failing to appear at the rendezvous, is conclusive, although the judge who hears the case regards the act as unconstitutional, or it is proved undeniably that the prisoner had passed the age prescribed by Congress and was exempt from the draft; but a like return to a *habeas corpus* issued for a woman would be nugatory, and might be disregarded by a State or federal court. Such also, as we have seen, is the rule when an authority to seize the vessel is pleaded by a collector of the customs as a defence to an action of replevin for the cargo.¹

The course adopted by the Supreme Court of Wisconsin in *Ableman v. Booth*² shows that the argument *ab inconvenienti*, so much relied on in *Tarble's Case*, was not wholly without foundation; and a like remark applies to *Kneedler v. Lane*,³ where the jurisdiction of a State court was invoked for a purpose which, if successful, would have seriously impeded the operations of the government for the suppression of the Rebellion. In this instance an injunction was prayed

claim and color of the authority, of the United States, and not under the mere pretence of having such authority." *Tarble's Case*, 13 Wallace, 397, 411.

¹ See *ante*, p. 1194.

² 21 Howard, 506; *ante*, p. 1202.

³ 45 Penn. 238.

for to prevent the draft which Congress had ordered as a means of filling the ranks which were thinned by the war. The ground taken was that the act was not a necessary and proper means of executing the power "to raise and support armies," and moreover tended to deprive the States of their militia, by forcing the entire able-bodied population into the military service of the United States. As often happens in such cases, the court was divided into two nearly equal camps. Each side adhered to the doctrines which they had imbibed in earlier life, and the preliminary injunction which had been granted would have been continued but for the casting vote of Judge Strong, who took the broad view of the Constitution which may be adopted by men of all shades of political opinion. Agreeably to the judgment of the majority of the court, as given by Reed, J., a State tribunal cannot restrain an officer of the United States from performing a duty imposed upon him by Congress. The State government and the government of the United States are distinct, each having different functions; and if the federal courts may prevent encroachment on part of the States, it is because the Constitution is paramount and confers the requisite authority for that end. The principle had been laid down in *Ableman v. Booth*, and applied wherever an attempt was made to control the exercise of an authority conferred by the General Government. It was contended, on the other hand, that there was nothing in the Constitution to preclude the State courts from staying the execution of an act which transcends the authority of the General Government. The language held in *Ableman v. Booth* should, like other *dicta*, be taken in connection with the facts. All that the decision really established was that when the jurisdiction of a federal court attaches it will, like that of every competent tribunal, be exclusive. If a State court cannot set aside or control the process or judgments of the federal courts, it is equally true that the federal courts have, as was decided in *Taylor v. Carryl*,¹ ordinarily no such power over the process or judg-

¹ 20 Howard, 553.

ment of a State court. As between co-ordinate tribunals, each is bound to respect the acts and proceedings of the other. But this rule does not apply when the act complained of is done, not in the legitimate exercise of judicial power, but ministerially, in pursuance of a command which is not warranted by the Constitution. The defendants were not acting under any judicial process from the United States. They were ministerial officers engaged in executing an act of Congress; and if the act was unconstitutional, they had no legal sanction for their proceedings. It had been repeatedly held that the State courts might, under these circumstances, afford redress or protection to the citizen through a *habeas corpus*. This jurisdiction had been exercised in New York, Massachusetts, Maryland, New Jersey, and New Hampshire; and in *The Commonwealth v. Fox* a recruit was discharged from the military custody of the United States, although the return to the *habeas corpus* issued in his behalf alleged that he was held as a deserter. It was established by these instances that the State courts have concurrent jurisdiction with the courts of the United States in all cases of illegal confinement under color of an unconstitutional law or command, where the act complained of is not done in the course of a suit or prosecution duly instituted in the federal tribunals.

The question would seem to be political rather than judicial, and should, perhaps, have been left to Congress, who might, instead of taking away the jurisdiction which the local courts had so long exercised, have attained the end by rendering such cases removable to the circuit courts of the United States. Such a course would have guarded against the dangers incident to the incompetency or prejudices of the State tribunals, — which, though vividly portrayed in *Tarble's Case*, were rather anticipated than felt, — and yet have left them free to intervene for the protection of the citizen.

Had the judgment in *Tarble's Case* been confined to the point actually before the court, — that a man who has been mustered into the service of the United States cannot be

released by a State tribunal, — it might have been regarded as within the line drawn in *Slocum v. Mayberry*; ¹ but in declaring that a pretence or color of federal authority will preclude the State courts from issuing a replevin or *habeas corpus*, it went further than the exigency required, and may be thought to have overstepped the line which separates the judicial province from the legislative. Where the Constitution does not prescribe the rule it is for Congress, and not for the national tribunals, to say whether their jurisdiction shall be concurrent or exclusive; and as Congress may limit, but cannot enlarge, the powers of the State courts, the Supreme Court should be slow to impose restraints which cannot be removed by Congress. It has been justly said that while legislative mistakes can be corrected, and not unfrequently indicate the true path to future law-makers, the errors of judges are precedents which bind their successors. This remark applies with more than ordinary force in the United States, where an erroneous interpretation of the Constitution is conclusive on the legislature. Such was the *Dred Scott* Case, which precipitated the Civil War by circumscribing the power of Congress, and precluding an amicable adjustment of the controversy save through an amendment of the Constitution that was impracticable under the circumstances.

Whatever the rule may be when the question is one of custody or possession, and not of right, there can be no doubt as to the power and duty of the State courts to give compensation in damages for an excess or abuse of power on the part of a federal officer. *Prima facie* every invasion of the right of property, or of personal freedom, is an infringement of the laws of the State, and he who maintains the contrary must show a sufficient justification. Unless the injured party could sue in the State courts, there might be a failure of justice, because the courts of the United States have no common-law or general jurisdiction. It does not necessarily vary the case that a decree or writ of a federal court is relied on as a justification. It may still be a question whether the federal

¹ 2 Wheaton, 1. See *ante*, p. 1194.

court had jurisdiction of the cause and the parties, or whether the act complained of was authorized by the writ. If, for instance, the marshal arrests one man on a warrant issued against another, or takes the goods of A on a *feri facias* against B, the injured party may bring trespass in a State court against the officer, and obtain compensation in damages,¹ although he cannot maintain a replevin, *habeas corpus*, or other proceeding which will disturb a possession that is virtually held by the court which issued the writ.²

The line of demarcation was drawn in *Buck v. Colbath*.³ Agreeably to the judgment, what *Freeman v. Howe* establishes is that persons or property held under process from a federal court are virtually *in custodia legis*, and cannot be taken from its officers by virtue of a writ issued by a State court or other co-ordinate tribunal. Trover and trespass are not within this principle, because they do not disturb the possession which has been acquired under the levy or attachment, and simply raise the question whether the writ is a justification. Judicial writs may be classified as follows: those which designate some specific thing or person, and those which simply command the sheriff or marshal to make a sum certain out of the defendant's property. In the first class the officer has no discretion, but must do as he is commanded; and hence, if the court had jurisdiction to issue the writ it will be a good defence in every other. In the second class the officer must determine for himself whether the property in question does or does not belong to the defendant, and is liable to be taken in execution; and the writ will not protect him against the consequences of an erroneous exercise of his judgment in a suit brought in any court of competent jurisdiction. Replevin and foreign attachment belong to the former category; a *feri facias*, or *levari facias*, to the latter. It is not, therefore, a good defence to an action of trespass *de bonis asportatis* in a State or federal court against the marshal, that he levied under a writ from the Circuit Court, unless it also appears,

¹ *Buck v. Colbath*, 3 Wallace, 334; *Day v. Gallup*, 2 Id. 97.

² *Freeman v. Howe*, 24 Howard, 450.

³ 3 Wallace, 334, 343.

or is proved, that the goods belonged to the defendant in the execution, or that they do not belong to the party who demands compensation.

The above classification seems to be inaccurate, although the principles on which it proceeds are sound. A libel in the admiralty, or other proceeding strictly *in rem*, is a justification as against all the world; and the officer may take the vessel into his custody without inquiring to whom it belongs, and although the party who contracted the debt or incurred the obligation is not the owner.¹ But the mandate of a writ of foreign attachment is not that the sheriff shall seize specific goods, but such goods in the possession of the garnishee as belong to the defendant in the attachment, and if the officer exceeds his authority by taking the goods of a third person, he is as much a trespasser as if he had levied on the property of A under a *feri facias* issued against B.² The effect of a writ of replevin is more doubtful; but as the judgment simply determines the right of property between the parties, it would seem that the sheriff is not justified in taking goods of a third person, although designated in the writ and found in the defendant's possession. The point is one about which the American authorities differ; and but little light can be derived from England, where replevin is only used as a means of regaining the possession of goods that have been distrained, and the question is, therefore, ordinarily, not as to ownership, but whether they were on the demised premises, and was the rent in arrear?³

The act of 1793 forbade the courts of the United States to enjoin proceedings in the courts of the several States;⁴ and except where such a writ is issued in bankruptcy, the rule is

¹ *Magee v. Beirne*, 39 Pa. 50; *Flanagan v. Mechanics' Bank*, 54 Id. 398.

² See *ante*, p. 1018; *Taylor v. Carryl*, 20 Howard, 583, 617; *Woodruff v. Taylor*, 20 Vt. 65; *Smith's Lead. Cas.* (8 Am. ed.), 911, 966, 973.

³ See *Server v. McGowen*, 13 Wend. 286; *Shipman v. Clark*, 4 Denio, 446; *Foster v. Pettibone*, 20 Barb. 350; *Sifford v. Beaty*, 12 Ohio (N. S.) 188; *Shipman v. Clark*, 4 Denio, 446; 2 *Smith's Lead. Cas.* (8 Am. ed.), 968.

⁴ *Ex parte Dorr*, 3 Howard, 13; *Taylor v. Carryl*, 20 Id. 596; *Watson v. Jones*, 13 Wallace, 679; *Leroux v. Hudson*, 109 U. S. 468.

the same under the Revised Statutes.¹ This is simply an application of the principle that the tribunal which first obtains jurisdiction shall retain it to the end, which, though meeting with a seeming exception while law and equity were administered by different tribunals, should be universal where both powers are lodged in the same hand; and a judge sitting as a chancellor may make a decree that will preclude him from taking the course which he would otherwise be bound to follow when sitting at common law.² The principle is irrespective of the relation of the State and federal tribunals, and applies as between courts deriving their authority from the same government.

It has at the same time been decided that there is an implied exception where an act of Congress cannot be carried into effect without bringing all the parties before the same tribunal. Such is the rule under the statute limiting the liability of owners for the torts of the vessel;³ and it was held in *The Providence Insurance Co. v. The Hill Manufacturing Co.* that the persons who had proceeded in the State courts to recover damages for a collision might be compelled by a monition from the admiralty to desist and present their claim before that tribunal.

It is immaterial that the admiralty does not take cognizance of the cause until after the institution of the proceedings at common law, because its jurisdiction becomes exclusive as soon as application is made to it for redress; and if the State court proceeds, the judgment may be reversed.⁴

It has also been said that when a State court proceeds after a petition for removal has been filed, security given, and a transcript of the record taken to the Circuit Court, the latter may issue an injunction; but the rule now is that both tribunals are equally entitled to form an opinion as to the sufficiency of the petition, and may each go on to judgment,

¹ See *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 Id. 341.

² See *Peck v. Jenness*, 7 Howard, 612.

³ *The Providence Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578. See *ante*, p. 1018.

⁴ *Providence Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578.

and it will then be for the Supreme Court of the United States to say which has erred.¹ As was observed in *The Chesapeake & Ohio R. R. Co. v. White*:² "If a sufficient case for removal was made in the Circuit Court, the rightful jurisdiction of that court is gone, and it cannot properly proceed further; but if it does proceed, and does force the defendant who applied for the removal to a trial, the remedy is by a writ of error after final judgment, and not by prohibition or punishment for contempt." "The proper practice in such cases was fully considered in *The Insurance Co. v. Dunham*,³ *The Removal Cases*,⁴ *The Railroad Co. v. Mississippi*,⁵ and *The Railroad Co. v. Koontz*.⁶ The courts of the United States may in the exercise of the jurisdiction conferred by the Bankrupt Act enjoin proceedings in the State courts which would impair the right or title of the assignee, or interfere with the effectual distribution of the estate among the creditors;⁷ but the power will not be so exercised as to preclude the State tribunals from enforcing mortgages, judgments, or other liens that have previously attached or become binding on the real or personal estate of the bankrupt."⁸

The State tribunals are withheld by comity and the principles above referred to from issuing an injunction against proceedings in the federal courts,⁹ and should be equally considerate in dealing with each other. Such reticence is the more proper because the end may generally be attained by filing a bill in the Circuit Court for the proper district.¹⁰

¹ *Chesapeake & Ohio R. R. Co. v. White*, 111 U. S. 134; *Railroad Co. v. Mississippi*, 102 Id. 135; *Railroad Co. v. Koontz*, 104 Id. 5; *Kanouse v. Martin*, 15 Howard, 198; *Kern v. Huidekoper*, 103 U. S. 485.

² 111 U. S. 134, 137.

³ 11 Wallace, 1.

⁴ 100 U. S. 457.

⁵ 102 U. S. 135.

⁶ 104 U. S. 5.

⁷ See *Ex parte Christy*, 3 Howard, 292; *Ex parte Foster*, 2 Story, 131; *Ex parte Eames*, Id. 322.

⁸ *Peck v. Jenness*, 7 Howard, 612.

⁹ *McKim v. Voorhees*, 7 Cranch, 279.

¹⁰ *English v. Miller*, *Richardson's Equity*, 320; *Riggs v. Johnson County*, 6 Wallace, 166; *The United States v. Keokuk*, Id. 514; *Weber v. Lee County*, Id. 210; *Kendell v. Winsor*, 6 R. I. 453; *Duncan v. Darst*, 1 Howard, 306.

The principle, as we have seen, is that a cause shall not be taken out of the hands of the court which has it in charge by the uncalled-for intervention of another tribunal; and hence, when a party who has been served with process, and is subject to the jurisdiction of a court, attempts to violate the principle by instituting a proceeding which covers the same ground, he may be restrained from taking a step which tends to prolong litigation and increase costs. The restriction laid on the federal courts by the act of 1789 and the Revised Statutes is, accordingly, limited to suits begun in the State courts before proceedings are instituted in the federal courts, and does not apply when the proceedings of the federal courts are first in date.¹ When, therefore, the plaintiff obtains a judgment in a State court notwithstanding the removal of the cause to a circuit court, and attempts to enforce the judgment by a suit in the same or another tribunal, the proceeding may be enjoined by the federal court.² If the action is replevin, and the defendant, after having erroneously obtained judgment in the State court, proceeds on the replevin bond, he may be restrained by an injunction from the Circuit Court.³ Such a course does not necessarily bring the rival tribunals into collision, because the writ is addressed to the party and not to the judges; but it should not be adopted unless the exigency requires it, and the error may generally be corrected by pleading the prior suit in bar or abatement.

In like manner the State courts may, for the purpose of protecting their jurisdiction when it was the first in time, enjoin the parties to the cause from instituting a new proceeding concerning the same subject in a federal court.⁴ It is immaterial in this regard that the new suit is instituted in another State, if the party is within the jurisdiction of the court, and subject to its process.⁵ In *The Home Insurance*

¹ *Fisk v. Pacific R. R. Co.*, 10 Blatchford, 518.

² *French v. Hay*, 22 Wallace, 250. See *ante*, p. 1092.

³ *Dietzsch v. Huidekoper*, 103 U. S. 494.

⁴ *Ackerly v. Vilas*, 15 Wis. 401; *Home Insurance v. Howell*, 9 C. E. Green, 238; *High on Injunctions*, section 111.

⁵ *Home Insurance Co. v. Howell*, 2 Lead. Cas. in Equity (4 Am. ed.), 1104.

Co. v. Howell, a bill was filed in New Jersey for the cancellation of two policies of insurance on the defendant's real estate in Illinois, as having been obtained by fraud, and^o that he might be enjoined from enforcing them by suit. The defendant alleged in his answer that he was a citizen of Illinois, and subsequently brought a suit on the policies in the Circuit Court of the United States for the Northern District of that State. The prosecution of this suit was enjoined by the New Jersey Court. The chancellor said : —

“ This court, having the power to hear and determine the subject-matter in controversy, is fully at liberty to retain it until it shall have disposed of it. The general rule is that as between courts of concurrent and co-ordinate jurisdiction (and the Circuit Court of the United States and the State courts are such in certain controversies — such as that involved in this suit, for example — between citizens of different States), the court that first obtained possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court.¹ Nor does it matter that the policies of insurance were issued in another State upon property in that State, and that the loss occurred there.

“ Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject-matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this State or any foreign jurisdiction, and of course, from prosecuting one commenced after the bringing of the suit in this court.”²

In *Akerly v. Vilas*,³ an action was brought in a State court in Wisconsin to foreclose a mortgage given to secure the bonds of the mortgagor, and also for a personal judgment against him ; and the defendant filed an answer setting up a partial failure of consideration. The plaintiff, who was a citizen of another State, then commenced an action upon the bonds against the mortgagor in the United States Court for the District of Wis-

¹ *Riggs v. Johnson County*, 6 Wallace, 166, 196.

² *Mead v. Merritt*, 2 Paige, 402. See 22 Wallace, 250.

³ 15 Wis. 401.

consin. The object of this change of forum was to evade the equitable defence which had been made in the State court; and it was frustrated by an injunction from that tribunal.¹

¹ "The general power of courts of equity, whose jurisdiction has once attached, to restrain parties from commencing and prosecuting subsequent actions in other courts for the same object, is unquestioned. If any doubt should exist it will be effectually dispelled by an examination of the cases cited by the counsel for the defendant. The defendant will be restrained at the instance of the plaintiff, and *vice versa*. The forum of jurisdiction in which the subsequent proceedings are taken, whether domestic or foreign, is immaterial. The injunction goes against the party, and not the court or officer. The doctrine of the English courts is well settled, and we are unable to find any American decision to the contrary. The sole inquiry is whether the ends of justice demand that the power should be exercised. If they do, the court first acquiring jurisdiction will retain the suit for a final determination of the rights of the parties, and restrain them from suing or proceeding elsewhere.

"The only question here is whether there is anything in the relations of the State and federal courts which should prevent the application of this general doctrine to a case like the present. The plaintiff's counsel insist that there is; that it will lead to troublesome and unnecessary conflicts, promote litigation, and violate the rules of comity and forbearance which should be maintained between the two jurisdictions. We think differently. It seems to us that no question of conflict of jurisdiction is involved. This is implied from the nature of the power exercised. No attempt to control or regulate the action of the federal court or its officers is made. The process is directed to the parties litigating before the court from which it issues; and it becomes a mere question of the power of that court to regulate and control their conduct in regard to the subject of such litigation.

"The argument drawn from the rules of comity would seem to be more appropriately urged in the District Court than here. It is the established and, we think, correct doctrine of the federal courts, as to all cases where the jurisdiction of the two judicial systems is concurrent and no appeal is given, that priority of suit determines the right. Proceedings in the action first commenced cannot be arrested or affected by those subsequently taken in another court. *Wallace v. McConnell*, 13 Peters, 136. The plaintiff having voluntarily submitted the whole controversy to the courts of the State cannot complain of the rules of law by which their action is governed, or that he is held to abide their determination; and the rules of comity, if they can be said to have any application, would seem to require that the junior action should be dismissed from the District Court. It was held in like manner, in *Conover v. The Mayor of*

The courts of either government, as it would seem, may also restrain acts which, though professedly done under a writ or mandate from the other, are manifestly from their nature so clearly beyond the authority relied on as a justification as to show that the agent grossly misunderstood, or wilfully exceeded, his powers. Such a case might arise were the cargo detained by the collector of the port under an authority to seize the vessel, or the defendant in a judgment taken under an order to levy on his goods, or a woman detained as a recruit under the acts authorizing the enlistment of men. Here the question is as to the nature and extent of the power, and not as to the manner in which it has been executed; but in *Cropper v. Coburn*¹ the court held that a circuit court of the United States may enjoin the sheriff from levying on the goods of A under an execution against B, and that a like restraint may be put by a State court on an erroneous levy by the marshal. This case is now overruled by decisions which establish that the relief given under such circumstances must be confined to compensation in damages, and that one co-ordinate tribunal cannot make any order that will impede the execution of the writs issued by another within the scope of its jurisdiction.²

The subject is not free from difficulty even where it is not complicated by the relation between the States and the federal Government. An injunction will not, ordinarily, be issued to prevent a sale by a sheriff or public officer, of land or goods belonging to one man as the property of another, because the sale will not pass the title, and redress may be had through an action of replevin or ejectment against the purchaser,³ or the officer may be made answerable in damages.⁴

New York (25 Barb. 513), that the court which first obtains jurisdiction of a cause may enjoin the parties from bringing the same cause into another court, although the court thus secondarily resorted to is a court of chancery, or endowed with equity powers."

¹ 2 Curtis, 465.

² See *ante*, p. 1196; 2 Lead. Cas. in Equity (4 Am. ed.). 1389, 1392.

³ *Shearick v. Huber*, 6 Binney, 2; *Winch's App.*, 61 Pa. 124; *Taylor's App.*, 93 Id. 21.

⁴ *Brewer v. Kidd*, 23 Mich. 440.

Such is the practice of the common law, even when, as in the case of a levy on personal property by the sheriff, the effect is to take the goods out of the complainant's possession, and transfer them to a third person; and equity will not intervene, save exceptionally to prevent irreparable injury,¹ or where the seizure is manifestly intended to promote some sinister or private end. As was said in *Winch's Appeal*,² "It is only when the creditor is undeniably proceeding against right and justice to abuse the process of the law to the injury of another that equity intervenes to stay his hand. In *Hunter's Appeal*³ the court sustained an injunction restraining the sale of a wife's real estate on an execution against her husband; but the decision was put on the ground that the separate property of a married woman is exempt by statute from levy and sale for the debts of her husband, coupled with an admission in the pleadings that the land levied on belonged exclusively to the wife." This fact was a controlling element; and in *Winch's Appeal*,⁴ where the title of the wife was disputed, the court refused to restrain the creditor from proceeding with his execution against the alleged interest of the husband, and thus preparing the way for an ejectment to test the right of ownership.⁵ It is, as we have seen, established under the recent course of decision that an application to stay the execution of a *feri facias*, attachment, or other judicial writ, or for the restoration of goods wrongfully taken by the marshal or sheriff, should be made to the court which issued the writ and has the exclusive control of the steps taken to carry it into effect.⁶

The limitation set to the power of the State courts to give specific relief against wrongs committed under color of an authority of the United States is entirely just as regards arrests and levies made under judicial process, but may have

¹ *Lewis v. Levy*, 16 Md. 85; *McCreery v. Sutherland*, 23 Id. 471; *Taylor's App.*, 93 Pa. 21; *Amis v. Myers*, 16 Howard, 492; *Wilson v. Butler*, 3 Mumford, 559; *Watson v. Sutherland*, 5 Wallace, 74.

² 61 Pa. 424.

³ 40 Pa. 194.

⁴ 61 Pa. 424.

⁵ *Taylor's App.* 93 Pa. 21.

⁶ See *ante*, p. 1196.

injurious consequences when applied to acts done ministerially, without the sanction of a court, and not under its control. An agent of the Government of the United States, or person claiming to act on its behalf, who arrests me, or takes my property, must show some writ or order which is not manifestly insufficient; and if he fails, the local tribunals should afford a remedy, because a wrong-doer might otherwise screen himself and effectuate his purpose under a pretence of authority from the United States.¹ The possibility of such abuses is evident because, according to a recent work on military law, a citizen may be carried to the farthest corner of the vast territory of the United States under a charge of desertion, or of giving aid and comfort to the enemy, and there tried, convicted, and executed by a military commission.² That the right of the State court to intervene for the prevention of such wrongs exists potentially, and may be exercised when not prohibited by Congress, is the more obvious, because the judiciary acts did not till recently authorize a suit to be brought in the federal courts for an injury inflicted by an officer of the United States, and left such torts, like other private wrongs, to the local tribunals.³

The remaining question, Have the State courts jurisdiction of offences against the United States? ordinarily receives a negative reply.⁴ It is a general, if not universal, rule that the courts of one sovereignty will not take cognizance of nor enforce the penal code of another.⁵ It is for the sovereign whose laws are violated to determine whether the offence shall be condoned or requires punishment. The appropriate conclusion of an indictment at common law was against "the peace of our sovereign lord, the king,"—for which in Pennsylvania we substitute "the peace and dignity

¹ See *Tyler v. Pomeroy*, 8 Allen, 480; *Commonwealth v. Downes*, 24 Pick. 227; *United States v. Wyngall*, 5 Hill, 17; *Wilson v. Mackenzie*, 7 Id. 95.

² See *ante*, p. 980.

³ See *Slocum v. Mayberry*; *Buck v. Colbath*, 3 Wallace, 334.

⁴ *Huber v. Reily*, 53 Pa. 112, 118.

⁵ *Houston v. Moore*, 5 Wheaton, 1, 35; *The United States v. Lathrop*, 17 Johnson, 4.

of the Commonwealth," — and the omission of such words was fatal on a motion in arrest of judgment, unless the defect could be cured by an amendment. In *Scovill v. Canfield*,¹ the Supreme Court of New York declined to enforce a penal statute of Connecticut, and in *The United States v. Lathrop*, it was held that the penalty for selling spirituous liquors contrary to the revenue laws of the United States could not be recovered in a State court notwithstanding an express provision to that effect in the act of Congress. Spencer, Ch-J., said it had been expressly declared in *Martin v. Hunter*,² that Congress cannot vest any part of the judicial power of the United States, except in courts ordained and established in conformity with the Third Article of the Constitution, and that the State courts were not the inferior courts contemplated in the Article. The case of *Ward v. Jenkins*³ is to the same effect, and such is the main current of decision.⁴

A seeming exception is reconcilable with the rule. While the States and the United States are for many purposes politically distinct, either government may adopt a law made by the other, and enforce a command which has become its own, although originally issuing from an extrinsic source. Such an exercise of jurisdiction is inadmissible unless both governments rule over the same territory, and their subjects owe allegiance to both; but may well occur under a feudal system, or in countries organized like Switzerland and the United States. A man cannot be indicted in a State court under a law passed by Congress, but an indictment may be maintained under a State law, providing that persons who do not comply with an act of Congress shall undergo the penalties which it prescribes. Such at least is the inference that may be drawn from the case of *Houston v. Moore*,⁵ although the judges differed so widely in their views as to render interpretation difficult.

¹ 14 Johnson, 339.

² 1 Wheaton, 330.

³ 10 Metcalf, 583, 587.

⁴ *Huber v. Reily*, 53 Pa. 112, 118.

⁵ 3 S. & R. 169; 5 Wheaton, 1. See *ante*, p. 1163.

It may also be contended that as the State laws and the laws of the United States together constitute the law of the land, which the citizens of each State are bound to obey,¹ so either government may afford redress for a violation of the laws of the other, whether the injury is to the public or to individuals.² Congress cannot confer jurisdiction on a State court, but they can lay down rules which the State court may administer by virtue of the sovereign power of the State over persons and things within its boundaries. This is conceded in civil cases, and there would seem to be no sufficient reason why it should not be true of criminal.³ The case is not like that of an indictment in England for a murder or other crime committed in France, because the French law is not the law of England, while the laws of the United States are laws in Pennsylvania. It is, as has been shown, established, that an indictment for an offence against a State may be removed to a federal court and prosecuted to judgment, although no offence has been committed against the United States;⁴ and the United States should, by the same rule, be entitled to appear as prosecutors in a State tribunal. It was accordingly held in *Buckwalter v. The United States*⁵ that the federal government might proceed in the courts of Pennsylvania for the recovery of a penalty imposed by an act of Congress; and such would seem to be the logical view, notwithstanding the judgment in *The United States v. Lathrop*.⁶

The question is now practically set at rest by the Revised Statutes, Section 711, which enacts that the jurisdiction of the courts of the United States shall be "exclusive of the courts of the several States as regards all crimes and offences cognizable under the authority of the United States;" but

¹ See *Claffin v. Houseman*, 93 U. S. 136.

² See *Houston v. Moore*, 5 Wheaton, 1, 27.

³ See the *United States v. Jones*, 109 U. S. 513, 520; *Houston v. Moore*, 5 Wheaton, 1, 27.

⁴ See *ante*, p. 1155.

⁵ 11 S. & R. 193.

⁶ See *Claffin v. Houseman*, 93 U. S. 130; *Bletz v. The Columbia Bank*, 6 Norris, 87, 93.

the rule thus laid down might be abrogated by repealing the prohibitory clause.

Whatever the rule may be where the breach is solely of a law of Congress, we have seen that acts which are injurious both to a State and to the United States may be forbidden by both; and the existence of a federal law rendering an offence criminal will not preclude the enactment of a similar statute by a State.¹ Under these circumstances the State courts may take cognizance of the offence in the latter aspect, although they would have no jurisdiction over it in the former. But for this principle treason could seldom be punished by a State, because treason against a State is generally also treason to the Union.

A false oath taken in the course of a judicial proceeding in a State court is not less an offence against the peace and dignity of the State because the court is administering an act of Congress, and the guilty party might be tried and sentenced for the same cause in a circuit court of the United States.² In *Rumpf v. The Commonwealth*, Gibson, J., said that the act of 13 Geo. II. chap. 7, and the colonial statute of Feb. 3, 1743, brought the naturalization of foreigners within the cognizance of the courts of Pennsylvania, and there was nothing in the Constitution of the United States to abrogate the authority thus conferred, or preclude the State courts from applying the rule laid down by Congress. Their jurisdiction depended on the laws of the State, but they might administer the laws of the United States, which were also the law of Pennsylvania. Naturalization was eminently a judicial act, as presenting a cause to be heard and decided on evidence, and depending on whether the applicant was or was not legally entitled to admission as a citizen. False swearing in the course of such a proceeding was consequently perjury under the common law of Pennsylvania, and might be punished as such by indictment. That it was also an

¹ *Fox v. Ohio*, 5 Howard, 410; *The United States v. Manigold*, 9 Howard, 560; *Moore v. Houston*, 3 S. & R. 569; 5 Wheaton, 1. See *ante*, p. 1151.

² *Rumpf v. The Commonwealth*, 30 Pa. 475.

offence against the federal government did not preclude the exercise of jurisdiction by the State. When a man stood in such a relation to two sovereignties that the same act was a breach of the duty which he owed to each, punishment might be inflicted by both, and his liability to chastisement by one could not be set up as a defence against the other.

It was notwithstanding decided in *The Commonwealth v. Felton*¹ that where Congress in incorporating a bank declare that the embezzlement of its funds shall be a misdemeanor, and prescribe the penalty, an act of assembly providing for the punishment of every one who participates in such an offence will be invalid, even as regards the accessories, although the act of Congress only relates to the principal. It is not easy to reconcile this judgment with the decision in *Ohio v. Fox*, that circulating false or spurious coin is punishable by the States as well as the United States; and there can be no doubt, as was held in *The State v. Tuller*,² that if the General Government has exclusive jurisdiction of offences committed in the internal management or administration of a national bank, the State courts may take cognizance of any wrong that is committed in the course of its transactions with third persons or the community at large.

¹ 101 Mass. 204.

² 34 Conn. 280.

LECTURE LVII.

Congress Authorized to Coin Money and regulate the Value thereof. — A Promise to pay Ten Silver Dollars Numerical, and may be fulfilled by the tender of an Eagle, or of any Coins that will together make up the Sum. — Payment to be made in whatever Money is Lawful when the Time arrives. — Contracts to pay a given Number of Dollars distinguished from Contracts for the Delivery of Bullion or Specific Coins. — Bank-notes issued with the Sanction of the Government, Money in the ordinary acceptation of the Term. — One Metal may be Substituted for another, or the Intrinsic Value of the Coin lessened relatively to Past Contracts as well as Future. — Is Printing Coining? and can Paper be Used instead of Metal? — The Debates in the Federal Convention not a Sure Guide in the Interpretation of the Constitution. — The power to Borrow carries with it an Implied Right to issue Bills of Credit, but not to render them a Legal Tender or to exact Forced Loans. — Can Paper Money be made a Legal Tender under the Right to declare War or the Right to Tax? — The Power to Regulate Commerce relates directly to the Means by which Trade is prosecuted, and includes the Currency not less than Telegraphy or Navigation. — The Power to Coin Money is enabling, and does not preclude a recourse to other Means. — The Framers of the Constitution unwilling to Sanction or Prohibit Paper Money. — The Implied Powers are as much a part of the Expressed Powers as if they were conferred in Terms. — Congress or a State Legislature may, in the exercise of their Powers, incidentally impair Property or Contracts.

By Article I., section 8, Congress are empowered to coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures. By the tenth section of the same Article, no State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender for the payment of debts. The act of July 11, 1862, provides that the notes of the United States shall be lawful money and a legal tender in payment of all debts, public and private. Was this act valid under the above clauses, or any other clause bearing on the subject? The inquiry is an interesting one, not only as regards the point involved, but

for the light thrown on the authority of Congress to determine what laws are "necessary and proper to carry the enumerated powers of the government into effect," — a question which has never, since Chief-Justice Marshall's great judgment in *McCulloch v. The Bank*,¹ been so elaborately examined as it was in *The Legal Tender Cases*.² The federal government has in general no power under the Constitution to vary a contract, or substitute a different mode of performance for that which the contract prescribes. Contracts are governed by the law of the place where they are made, or the law of the place where they are to be performed; and the interpretation and effect of an agreement made and to be kept in a State will consequently, under ordinary circumstances, depend on the laws of the State, and not on those of the Union. Congress could not, for example, provide that a contract for merchandise might be satisfied by the delivery of kine, or that a tender of money should be a satisfaction of a contract for cattle. But when the act to be performed by the terms of a contract is the payment of money, the United States may, to the extent of their power of issuing money and regulating its value, say how and at what rate the payment shall be made.

This results, first, from the authority which the Constitution has conferred upon Congress "to coin money and regulate the value thereof;" and next, from the terms of the contract itself, which, in stipulating for money, must be understood as meaning lawful money, or, in other words, such money as shall be lawfully issued by the only power which has authority to issue money under the Constitution. An agreement to pay in silver dollars may, accordingly, be fulfilled by a payment in gold, because gold dollars are by the law of the land, for all the purposes of payment, equivalent to silver.³ The material words in every such case are those which fix the numerical amount of the debt, and if this be tendered the creditor cannot refuse to receive it on the ground that the metal of which the pieces are composed is

¹ 4 Wheaton, 316. See *ante*, p 105.

² 8 Wallace, 603; 12 Id. 451; 110 U. S. 421.

³ *Mervine v. Sailor*, 5 Philad. 422, 466.

different from that for which he stipulated ; nor can a tender be objected to as insufficient because the currency has been debased since the debt was contracted, and the sum offered is less in weight or value than would have been due but for the change. If, indeed, the contract be for bullion, for so many pounds, ounces, and pennyweights of gold or silver, the very thing contracted for must be offered, as in the case of other contracts for the delivery of merchandise. But when it is expressly, or by implication, for dollars, the only point open for consideration is whether the stipulated number of dollars has been paid ; and no investigation will be made into their composition, or intrinsic value, except for the purpose of ascertaining whether they correspond with the legal standard, and are dollars within the meaning of the law.¹ There are, no doubt, cases which lie so near the dividing line as to render it difficult to know whether the parties have bargained for weight and value, or simply for number, and to decide between a creditor who demands that the pieces tendered shall be assayed and weighed, and a debtor who insists that they shall be merely counted. Such a question may, for instance, arise with regard to the ground rents payable in coin of a stipulated weight and fineness, — which were, and indeed still are, not uncommon in Pennsylvania, — and in other cases which I cannot now pause to enumerate. But the difficulty, under such circumstances, is one of construction, and not of principle ; and when the contract is unequivocally for dollars, a tender of such dollars as Congress have provided will fulfil the contract.

It results from these considerations that the power of Con-

¹ A government may, notwithstanding, establish two different currencies, and leave the subjects free to choose in which they will keep their accounts, buy and sell, or become answerable in any other way. Such is the rule in the United States, where, under the interpretation given to the acts of Congress in *Bronson v. Rodes* (7 Wallace, 229), the duties on imported goods, and a large part of the public debt, are payable in gold and silver ; and whether a debtor is bound to pay in specie, or in the notes which were made a legal tender by the act of 1862, depends on the terms of the agreement, although a promise to pay in lawful money must, where there are no specific words disclosing a different intent, be fulfilled in paper, and not in coin.

gress over the currency is supreme. It has no limit, because none is set to it in the Constitution.¹ Congress may by law declare any coin equivalent, for the purpose of payment, to any other of greater or less intrinsic value,² and by a necessary sequence render debts contracted in coins of one kind payable in coins of another kind, equalling the numerical amount of the debt. A promise to pay ten dollars silver money of the United States may, for instance, be fulfilled by the tender of an eagle, or of ten gold dollars, or of a hundred dimes. The question is an arithmetical one, whether the money proffered by the debtor makes up the sum for which he is bound. Were Congress to substitute a different metal in coining dollars, as, for instance, nickel for silver, or platinum for gold, no one could question the validity of the act.³

That the discretion thus conferred on Congress may be exercised unwisely, and produce effects which every honest man must regret, cannot be denied; but it results from the necessity of having a means of interchange which shall be so fixed and certain that its legal value can be ascertained by

¹ See *Gibbons v. Ogden*, 9 Wheaton, 1, 191; *ante*, p. 430.

² The *Legal Tender Cases*, 12 Wallace, 457, 548; 110 U. S. 421, 449.

³ See *The Metropolitan Bank v. Vandyck*, 23 N. Y. 400, 425; *Legal Tender Cases*, 12 Wallace, 549; 110 U. S. 421, 449.

So, under the power to coin money and to regulate its value, Congress may (as it did with regard to gold dollars by the act of June 28, 1834, chap. 95, and with regard to silver dollars by the act of Feb. 28, 1878, chap. 20) issue coins of the same denominations as those already current, but containing less of the precious metals in weight or value, and thereby enable debtors to violate the spirit of their obligations while adhering to the letter. A contract to pay a certain sum of money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money of the place and time at which payment is to be made. 1 Hale, P. C. 192-194; Bac. Ab. Tender, B. 2; Pothier, *Contrat de Vente*, No. 416; Pardessus, *Droit Commercial*, Nos. 204, 205; *Searight v. Calbraith*, 4 Dall. 324. As observed by Mr. Justice Strong, in delivering the opinion of the court in the *Legal Tender Cases*: "Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is therefore assumed with reference to that power." The *Legal Tender Cases*, 12 Wallace, 457.

inspection, and computed numerically, without pausing to examine what it is intrinsically worth. And as this object cannot be attained without some common arbiter whose authority is recognized by all, the sovereign is everywhere entitled to declare what shall be money, and at what rate it shall be taken and pass from hand to hand. If the power to do this did not exist, or remained in abeyance, the precious metals would be of comparatively little use to mankind; because, although less susceptible of a change of value in any one year than most other commodities, they are yet liable to variations in the course of time, which necessitate a corresponding alteration in the standard of the currency. That the power of government is and must be paramount where money is in question, and that contracts for money must be presumed to be made with the full knowledge that this power exists and may be exercised, has accordingly been held in most countries where the question has arisen for judicial consideration,¹ and is said by Pothier to be true even when the payment partakes of the nature of a restitution, as in the case of a vendor who comes to redeem property which he has sold conditionally, by returning the price originally given for it by the purchaser.

¹ See *The Emperor of Austria v. Kossuth and Day*, 2 Giffard, 678; 3 De G. F. & J. 217, 251; Pardessus, *Cours de Droit Commercial*, No. 205; Troplong, *Traité de la Vente*, No. 163.

In *The Emperor of Austria v. Kossuth and Day*, 3 De G. F. & J. 217, 251 (*ante*, p. 1134), "it was urged for the plaintiff that the right of coining money, the *jus cudendæ monetæ*, was universally acknowledged to be a prerogative of sovereigns, vested in them for the benefit of their subjects; that this prerogative right extended no less to the creation of paper money than to the stamping of coin; that it was acknowledged by all nations and recognized by international law; and that, international law being part of the law of England, this court would interfere in favor of the rights recognized by and founded upon it." This view was adopted by the Vice-Chancellor, who observed, in giving judgment: "That the right of coining money is the prerogative of a sovereign is laid down by all the writers on international law; and I see no reason to doubt that the prerogative right reaches to the issue of paper money. Burlamaqui (a) (vol. iii. p. 241) mentions and treats of it as so extending." *The Emperor of Austria v. Kossuth and Day*, 3 De G. F. & J. 217, 251.

"It remains to be observed, in regard to the price, that it may be rendered in money different from that in which it is paid. If it is paid to the seller in gold, the seller may repay it in pieces of silver, or *vice versa*. In like manner, though subsequent to the payment of the price the pieces in which it is paid are increased or diminished in value, — though they are discredited, and at the time of their redemption their place is supplied by new ones of better or worse alloy, — the seller who exercises the redemption ought to repay, in money which is current at the time he redeems, the same sum or quantity which he received in payment, and nothing more or less. The reason is that in money we do not regard the coins which constitute, but only the value which the sovereign has been pleased that they should signify."¹

A common law authority to the same point may be found in the case of mixed money,² to which I may add *Shoenberger v. Watts*,³ and the *Legal Tender Cases*.⁴ A contract to pay or deliver the money of one country in another may be governed by different principles, which it is unnecessary to consider on this occasion.

Accordingly, when Congress, during the presidency of Jackson, reduced the intrinsic value of the gold eagle, at the instance of Mr. Benton, from 247 grains of pure and 270 grains of standard gold, at which it had been fixed by the act of April 2, 1792, to 232 grains of pure and 258 of standard or alloyed metal, and yet at the same time declared that every such eagle should be of the value of ten dollars, and receivable as such in payment, the arguments of the opponents of the bill were addressed to its inexpediency and injustice, and no one thought of asserting that it was unconstitutional, or questioned the power of the legislature to declare that debts might be paid in dollars consisting of a greater amount of copper and a less amount of gold

¹ Pothier, *Traité du Contrat de Vente*, No. 416.

² J. Davies, R. 48.

³ 1 Law Register (N. S.), 553; 5 Philad. 51.

⁴ 12 Wallace, 457, 548, 566.

than was required by law at the time when they were contracted.¹

It is proper to point out that the intervention of the legislature in this and other cases of the same nature does not vary the contract, and merely reduces it to certainty by giving a construction to that which would otherwise be vague and indefinite. An agreement for the payment of a thousand dollars, or any other sum, in lawful money of the United States would fail of effect from the generality of the words employed, and the want of a standard of interpretation, if the government did not ascertain the meaning by defining the lawful money for which the agreement stipulates. The rule which it prescribes may operate partially and unjustly, but it is not unjust that it should prescribe the rule, because the agreement is so worded as to render it the arbiter. The parties might have placed themselves beyond the reach of Congress by stipulating for payment in wheat or bullion, taking the evil with the good, and submitting to the uncertainty, delay, and other inconveniences inseparable from such a mode of contracting; among which may be mentioned the loss of the right to ascertain the amount due by computation, and the necessity for calling a jury to assess the damages. Or they might agree that government should fix the value of what was to be given and received, by entering into an

¹ The Legal Tender Cases, 12 Wallace, 457, 471, 552.

It was ingeniously contended by counsel in the Legal Tender Cases, and reiterated in the dissenting opinion of Mr. Justice Clifford, that this worked no real injury to the creditor, because gold dollars previously to the change were worth more than silver, and no one thought of tendering them in payment. If this was true at the time, the danger of tampering with the currency became evident not long afterwards, when the influx from the mines of California and Australia reduced the value of the gold below that of the silver dollar, and gave an opportunity for payment in a depreciated currency that would not have occurred but for Mr. Benton's measure; "as before no one would pay a debt with gold, so no one now would pay it in silver." A still greater injury was done to public credit in 1878 by the passage over the President's veto of a bill for the coinage of silver dollars which, though made a legal tender, contain less than eighty-four cents' worth of bullion, and rate in the markets of the world at least sixteen per cent below the debased gold dollar.

express or implied obligation to accept whatever Congress should, in the legitimate exercise of their powers, issue as and declare to be lawful money. But while either path may be taken, both cannot be pursued simultaneously; and the choice when once made must be abided by. If the question of value is left to the government by bargaining for money, and it fails in the performance of its trust, the parties must submit as they would have been obliged to yield if they had stipulated for bullion, and the jury had rendered an erroneous verdict. This will be true, even when a particular kind of money is contracted for, so long as the contract is for lawful money of the country, because the limitation will be rejected as inconsistent with the general design of the contract. That a particular must yield to a general intent, when both cannot stand consistently with each other, or with the law, is a well-settled rule in the construction of grants and contracts; and no repugnancy can be greater than that which must result from an attempt to unite the different and irreconcilable attributes of money and merchandise, of bullion and coin, of that which is to be delivered by assay and the scales and that which need only be counted.¹

Without enlarging on a point which may seem too well settled to be open to controversy, I may add, in order to prevent misconception, that if a change in the standard of the coinage involved a variation of contracts payable in coin, it would be no argument against the constitutionality of the statute by which the change was made. The States are forbidden to impair the obligation of contracts, but no such restraint is imposed on the United States; their inability arises solely from the want of power, and ceases to exist when a contract stands in the way, or falls within the scope of any of the powers conferred, expressly or impliedly, by the Constitution.² By the passage of a bankrupt law Congress may at any time not merely vary, but abrogate, the

¹ See *Shoenberger v. Watts*, 5 Philad. 51, 56.

² See *ante*, p. 1233. See *Bronson v. Rodes*, 7 Wallace, 229.

most solemn obligations; by declaring war it suspends, or annuls, every agreement which cannot be carried into effect, giving aid and comfort to the enemy. And if a contract comes in conflict with the power of Congress to issue money and declare the value thereof, there can be no doubt that the contract must give way, and not Congress.¹ But for reasons which have been already assigned, I conceive that full effect may be given to this power by reading contracts for money by its light, and using it as a key to their meaning. If treasury notes are lawful money by force of the act of 1862, the declaration that they should be a legal tender was superfluous, and they may be tendered under the terms of the contract as legally interpreted. If they are not money, Congress could not make them a legal tender.²

To ascertain whether a tender is valid within these principles, we may consider, in the first instance, the terms of the contract. If these stipulate for lawful money of the United States, the question may readily be answered, because that is lawful which the legislature so declares. This may be true, although the promise is for a given sum in silver dollars, and gold is tendered; because "dollar" is a term of art, and under the authority to coin money and declare the value thereof, Congress have enacted that gold and silver dollars shall be monetary units, and equivalent whenever the contract is for a given sum, as distinguished from specific coin.³ So if Congress are expressly or impliedly authorized to give to treasury notes or bills of credit the quality of lawful money of the United States, they may by a parity of reasoning provide that such instruments shall, for all the purposes of payment, be equal to coin.⁴ There is nothing in the nature of things to forbid such a conclusion, if it is in other respects consistent with the language of the Constitution. Such instruments are promises to pay, stamped

¹ The Legal Tender Cases, 12 Wallace, 457, 550. See *ante*, p. 575.

² The Legal Tender Cases, 110 U. S. 421, 429.

³ The Legal Tender Cases, 12 Wallace, 549; 110 U. S. 421, 449.

⁴ The Legal Tender Cases, 12 Wallace, 549; 110 U. S. 421, 449.

or written on paper, and wanting in the intrinsic value which must, to a greater or less degree, belong to coin. This, however, goes no part of the way towards establishing that they are not money, and within the money-making power which is an established, if not indispensable, attribute of sovereignty. A promise to pay a dollar, made in good faith by a debtor who has the means and inclination to keep his word, may, as the financial history of this country demonstrates, be more valuable than a coin which, though stamped as a dollar and so denominated, contains only eighty cents' worth of silver, and will not pass for more beyond the limits of the United States. There was no doubt a period when metallic currency was the only one used or known, and when the idea had not yet arisen that money could exist in any other form; but this state of things has long since passed away, and much the larger part of the transactions, for which money is requisite, are now carried on through the instrumentality of notes like those which Congress has recently declared a legal tender.

"The whole fallacy of the argument for the defendant," said Lord Mansfield, in *Miller v. Race*,¹ "turns upon comparing bank-notes to what they do not resemble, and ought not to be compared to, namely, to goods, or to securities or documents for debts. Now, they are not goods, nor securities, nor documents for debts, nor are so esteemed, but are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are, or any other current coin that is issued in common payments as money or cash."²

¹ 1 Burrow, 452.

² "Money," said Hamilton, "is the very hinge on which commerce turns. And this does not mean merely gold or silver; many other things have served the purpose with different degrees of utility. Paper has been extensively employed." Hamilton's Opinion on the Constitutionality of the Bank of the United States, Hamilton's Works, vol. iii. p. 213. New York and London, 1885. So Webster observed: "Bank-notes, in a strict

When notes thus became money in fact they were, as the language of Lord Mansfield shows, necessarily recognized as such by the law, and brought within its control, and government was everywhere compelled to regulate the new circulating medium which had grown out of the progress of society, and say when and by whom it should be issued, and how far it should be made or allowed to become a substitute for coin.¹ Without some superior and adjusting hand paper currency might, as experience soon proved, easily become a great and pernicious evil; and the motives which had led mankind to agree with unexampled unanimity that the emission and regulation of currency is an affair of state which government must control continued to operate after metallic currency had to a great extent been replaced by paper.

It is not, therefore, surprising that the power to make paper money a legal tender should have been generally claimed and exercised in modern times, and it would not be deemed questionable in any country, or under any form of government but our own.² When irredeemable it is universally regarded with disfavor, and yet has been as universally adopted as a necessary expedient. Such has been the case in most states on the continent of Europe; and when

and technical sense, are not money; but in a general sense, and often in a legal sense, they are money. They are substantially money, because they perform the functions of money. They are not, like bills of exchange or common promissory notes, mere evidences of debt, but are treated as money in the general transactions of society. . . . And this character of bank-notes was as well known and understood at the time of the adoption of the Constitution as it is now. The law both of England and the United States regarded them as money in the sense above expressed " Webster's Speech on the Currency, Sept. 28, 1837, Webster's Works, vol. iv. p. 339.

¹ See Hamilton's Opinion on the Constitutionality of the Bank of the United States, Hamilton's Works, vol. iii. p. 213; Webster's Speech on the Currency, Sept. 28, 1837, Webster's Works, vol. iv. p. 341.

² The *jus culendæ monete*, or prerogative of coining money, is irrespective of the material employed, and is universally regarded as incident to sovereignty. Not only the metals may be used, but paper, or even, it has been said, leather. The Emperor of Austria v. Day and Kossuth, 2 Giffard, 628; 3 De G. F. & J. 217. See *ante*, p. 1134.

specie payments were suspended in England under the pressure of the Napoleonic wars, Parliament found itself obliged to provide that the notes of the Bank of England should not be paid in specie nor enforced by suit, — thus virtually rendering them a legal tender so far as the obligation which they imposed was concerned. And as the law now stands, Bank of England notes are a legal tender for all demands, except when presented for redemption at the counter of the bank.

I do not refer to these acts as a proof that a like measure could be adopted here. It is the felicity of the American people that, while they are sovereign, they have given bonds not to exercise their power despotically, and cannot, even on the pretence of necessity, or of the greatest good of the greatest number, disregard the rights of individuals. But in determining whether an unenumerated power can be used in aid of one that has been expressly given, what other nations have done under similar circumstances may be an argument for regarding the same course as necessary and proper here.

If we now turn to the inquiry whether the act declaring that treasury notes are lawful money of the United States is expressly or impliedly authorized by the Constitution, our attention will naturally be drawn to the clause by which Congress are empowered "to coin money, and declare the value thereof, and of foreign coin." This language may be thought to want clearness and precision, and leaves room for an argument on either side of the question. If the Constitution had said that Congress might make or issue money, and declare the value thereof, the term "money" would have borne its most general signification, and included paper money as well as coin. If it had said that coin might be stamped or issued, and the value thereof declared, there could have been no reasonable doubt that a metallic, and not a paper, currency was intended. But the use of a general term to describe the object, attended by the designation of a specific means, renders it more or less questionable whether the end is to be narrowed by the means, or the means enlarged to meet the end. The language of Daniel,

J., in *Fox v. The United States*,¹ might convey the idea that coining is synonymous with stamping, and that the standard of value may be impressed on any material that may be selected by Congress. Taking the words in the natural sense in which every instrument should be construed when a contrary intent is not apparent, the power "to coin money and regulate the value thereof" does not seem in terms or in effect to be a power to issue money which is not coin. The argument was admirably stated by Judge Sharswood in *Borie v. Trott*,² and subsequent writers on the same side have done little more than put it in other words.³

¹ 5 Howard, 410, 413.

² 5 Philad. 366, 403.

³ "The word 'coin' is one of well-settled meaning. The primary sense of the noun, according to Dr. Webster, is 'the die used for stamping money;' and the undisputed signification of the verb, according to most if not all the lexicographers, is 'to stamp metal and convert it into coin.' In Wharton's 'Law Lexicon' (*ad verbum*) it is said: 'Strictly speaking, coin differs from money as the species differs from the genus. Money is any matter, whether metal, paper, beads, shell, etc., which has currency as a medium in commerce. Coin is a particular species, always made of metal, and struck according to a certain process, called coining.' It was urged at the bar — I do not know whether seriously or not — that printing is stamping; and these notes might therefore literally be said to be coined. No such use of the word in any author has been shown. We may say, figuratively, 'to coin a story,' meaning to invent one, but never 'to coin the book' in which it is printed. The story is a fiction, — the coinage of the brain, — the book a reality. Surely, however, no one will contend in earnest that if a sufficient number of clerks had been employed, and these notes had all been written with the hand, they would have been unconstitutional, but that printing them makes them valid. To state the case thus is to reduce the argument to an absurdity. It may seem like laboring unnecessarily a very plain proposition, but I will hazard some further illustrations.

"The notes in question draw a plain distinction on their face between themselves and coins. They promise to pay dollars. What is a dollar? To a similar question, what is a pound, Sir Robert Peel answered: 'A pound is a definite quantity of gold, with a mark upon it to determine its weight and fineness.' Many pages have been written to controvert this definition, and to prove that a pound is a mere abstraction, — something like a mathematical point, without length, breadth, or thickness. But common-sense, I think, vindicates Sir Robert Peel. A standard measure must be some actual length or capacity, — a standard weight

The reasons given by Mr. Justice Strong, in the following citation from *Shollenberger v. Brinton*,¹ for construing the

some actual weight. How else can other weights and measures be compared with it? This is the object of a standard. So a standard of value must be some actual value. I would say, drawing the definition from the statute-book, — I know not where else to look for it, — a dollar is a silver coin, weighing four hundred and twelve and one half grains, or a gold coin, weighing twenty-five and four fifths grains, of nine tenths pure to one tenth alloy of each metal. These notes, then, promise to pay coins. To say that they are themselves coins is to make the promise and performance identical. As they do not state on their face when they are to be paid, in law, if issued by an individual or corporation, they would be payable on demand. *Whitlock v. Underwood*, 2 B. & C. 157; *Story on Notes*, par. 29. Payable in what? In themselves, if they are coins or dollars. They are promises to pay on demand, payable in promises to pay on demand. A promise to pay may represent coin, and circulate as such. It is properly designated as currency, and is one of many modes by which the use of an expensive standard may be spared by the substitution, as a medium of exchange, of public or private credit. It is safe and convenient, as well as economical, as long as it represents the standard by being immediately convertible into coin. But in its very nature it is not coin. Its value or power of purchasing other commodities depends as well upon the confidence of the community in the ability and intention of the issuers to redeem it as upon the amount issued. Coin, upon the other hand, possesses present, actual, intrinsic value. If you obliterate from the pound weight the public mark which attests its conformity to the standard, it still weighs the same as before. So you may erase the image from the coin, yet its value remains. Blot out, however, the superscription from these pieces of paper, and nothing remains; they are worthless. The stamp on the coin is really nothing but a certificate of the weight and fineness of that piece of metal. Government guarantees nothing but this, — makes no contract to deliver corn, wool, or leather in exchange for it. The power of regulating its value can only extend to declaring that in law a certain number of one coin shall be deemed the equivalent of another of a different denomination, in contracts and other transactions. In the market unequal values cannot be made equal by law. Congress has no power to enact how many bushels of wheat an eagle shall exchange for; and if they had, and should make the experiment, the act, like all attempts by government to change the laws of value, which are natural laws, would be futile. . . .

“If the word ‘coin’ has any more general or figurative sense in the phrase ‘to coin money’ than that I have assigned to it, it must be held to have the same in other parts of the article. In foreign coin will be

¹ 52 Pa. 9, 67; *Fletcher v. Peck*, 6 Cranch, 87.

coinage power as authorizing the creation of money in any form, are, however, so cogent as to inspire the reasonable doubt which, according to numerous authorities, should induce the judiciary to hesitate in declaring the means provided by Congress, for the attainment of an end enumerated in the Constitution, an excess of power, and setting them aside.¹

“When [said he] it is considered in what brief and comprehensive terms the Constitution speaks, and how sensible its framers must have been that emergencies might arise when the precious metals might prove inadequate to the wants of the government and the need of the people; when, also, it is considered that paper money was almost universally in use as a medium of exchange, I cannot think it a latitudinarian construction of the Constitution to regard the phrase ‘coin money and regulate its value’ as synonymous with making money, or supplying a currency. If it had been the design to confer the power of declaring what should be money, in what language could it have been conferred more appropriate than that which was used? It was purposely comprehensive. Without a regard to the object intended it amounted to no grant at all. Congress was not empowered in express terms to declare what should be money, nor to purchase bullion for coining; yet without these powers the authority to coin would not have effectuated the objects for which it must have been given. The power, then, cannot be construed literally. If it is it is no power at all.

included foreign paper money, and Congress may regulate its value and make it a legal tender. They may thus treat notes of the Bank of England and France, Austrian and Russian government-money, but not State bank-notes. Congress have no power of regulating the value of any money except foreign coins, and money coined by its own authority. If to coin money means to stamp paper, then the clause which forbids the States ‘to emit bills of credit’ was unnecessary; the prohibition to coin money included it. The terms of that very prohibition show that, in the minds of the makers of the Constitution, ‘to coin money’ and ‘emit bills of credit’ were two entirely distinct and different things. In short, in whatever point of view it is regarded, it seems to me that the position that this clause authorizes or permits any other but metallic money is untenable.” *Borie v. Trott*, 5 Philad. R. 366. 403.

¹ *Shollenberger v. Brinton*, 52 Pa. 9, 67; *Legal Tender Cases*, 12 Wallace, 437, 531; *United States v. Harris*, 106 U. S. 629; *Borie v. Trott*, 5 Philad. 366, 393. See Professor Thayer’s article in the *Harvard Law Review* for September, 1887, pp. 73, 92 note.

If coining money and regulating its value means no more than putting a stamp on pieces of metal, and declaring what they are worth, it is no power over the currency, and there is no legalized currency. Stamping pieces of metal does not make them money. Coining money, therefore, and regulating its value, means something more than making coins out of metallic substances. And, again, there is no restriction to any particular metals. The States may not enact that anything but gold and silver shall be a legal tender, but Congress may coin money; that is to say, the opponents of the constitutionality of this act give the character of money to pieces of metal. It has made money out of copper, and declared it a legal tender for small amounts. Its power to do this has not been questioned. Nor is there any provision that the pieces of metal which Congress may coin as money shall have a legal value corresponding at all to the intrinsic value of the metal in the market. Upon this subject the Constitution is silent. The regulation of value may be changed from time to time; it has been more than once, without denial of the power of Congress to change it. Our coins have been debased, and a smaller weight of pure gold or silver is now required for a dollar than was formerly required. It seems, therefore, to have been left to Congress to determine how far the statutory value of coined metal should correspond with the market value of the same metal as bullion. It is not claimed that the expression 'to coin money and regulate the value thereof' expresses or implies any other restriction than that the substance of which it is coined shall be metallic. But it is possible that gold or silver be formed into a leaf not thicker than bank-note paper. If upon such a leaf stamped in any way a value be affixed by Congress of one hundred dollars, why is it not money, even in the view of those who insist that coining money is applicable only to metallic substances? There is no prescription of any form for the pieces of money that may be coined. Thus it appears that the object of the power was to enable Congress to furnish a currency; and the nature and value of the material of which it is to be constituted are certainly a subordinate, if not an immaterial, thing. Indeed, the intrinsic value of the material is left wholly to the discretion of Congress. And it may be added that the literal construction of the clause 'to coin money and regulate the value thereof,' so much insisted upon in the argument against the constitutionality of the act of Feb. 25, 1862, not only renders the

power nugatory, but it is at variance with the acknowledged rules for construing the other substantive powers granted to Congress. They have never been construed literally. Thus the power to make war and carry it on is conferred by the words 'declare war.' A literal construction of these words would limit the power of Congress to a mere avowal of the existence of war. So the power to regulate commerce has always been construed according to its spirit, not its letter. It has even been held that under it foreign commerce might be destroyed in a time of peace. Such was in effect the decision that sustained the constitutionality of the embargo. The construction given to the power to establish post-offices and post-roads is another illustration of the understanding that the express substantive powers of Congress are not to be construed literally. Why then should the power to coin money be so construed? When the Constitution was adopted the great thing sought in regard to the currency was uniformity of value. This could not be secured by local legislation. Hence the restrictions on the States, and the grant to the federal legislature without any express restriction. An exclusively metallic currency was not suited to the exigencies of a civilized and commercial age. It had proved inadequate during the Revolutionary War, and could not meet the wants of a rapidly extending trade. In view of this it appears to me no unwarranted stretch of constitutional authority to regard a grant of power to coin money as no prohibition of a power to make and use paper money as a means for executing other great powers of the government, if it be not in itself a general and unrestricted power to create a currency."¹

The power to coin money and to declare the value thereof does not stand alone, and must be considered in connection with other powers which, with more or less reason, have been held to warrant the creation of a paper currency, and making it a legal tender. These are the power to borrow money, the power to declare war, the power to tax, and the power to regulate commerce with foreign nations and among the States. The right of Congress to emit bills of credit, and render them a legal tender under the above clauses, considered separately or in connection with the coinage power, is the matter in dispute. The last-named power was re-

¹ 52 Pa. 67.

garded by some jurists as not merely authorizing a specie currency, but precluding the creation of money in any other form. Agreeably to their view the Constitution, in designating a specific method, impliedly prohibited every other.¹ It was contended, on the other hand, that Congress would not have been entrusted with the power to convert the metals into money, and give them a legal value which may differ widely from the actual, had the intention been to deny them a like power should a paper currency, owing to the force of circumstances, take the place of specie.² The United States were empowered, and the States forbidden, to issue the metallic currency which the framers of the Constitution contemplated; and the States were also forbidden to emit bills of credit, and make anything but gold or silver a legal tender, while no such restriction was imposed on the United States. The prohibition was evaded, and a paper currency issued by banks created by State legislation, which took the place of specie on the occurrence of the Civil War, as it had done during the war of 1812 with England, and at each financial crisis; and the country was forced to depend for its circulation on the depreciated notes of private corporations.³ It was a natural inference that Congress might regulate the currency in its existing form. Such was the view indicated by Hamilton, and subsequently adopted by Madison, by the elder Dallas, by Calhoun, by Webster, by Chase,—in fine, by all the eminent men of either party who had occasion to deal practically with the currency.⁴ And when the question was brought to the test of a judicial decision, both sides not only agreed on this point, but went further, by holding that Congress might issue bills of credit, and suppress the State banks by prohibitory taxation,—the

¹ *Borie v. Trott*, 5 Philad 366, 397.

² See Mr. Calhoun's Speech of Feb. 26, 1816, on the Bank Bill, as cited in Webster's Works, vol. iv. pp. 350, 461. See *ante*, p. 276.

³ See *ante*, p. 268.

⁴ See Hamilton's Works, vol. iii. p. 215; Madison's Message of Dec. 5, 1815; Webster's Works, vol. iii. pp. 335, 346, 348, 461; *Veazie v. Fenno*, 8 Wallace, 537; *The Legal Tender Cases*, 12 Id. 457, 543, 577.

difference being whether rendering treasury notes a legal tender was an appropriate means of accomplishing the object.¹

The power to contract loans, like the other powers enumerated in the Constitution, is given in brief and comprehensive terms. Congress shall have power to borrow money on the credit of the United States. When an authority is bestowed absolutely for governmental purposes, no limitations or restrictions can be implied except those incident to the subject-matter, and the end for which the authority is conferred. Within these limits it is paramount, although it cannot be carried further for reason of policy or convenience.² Congress accordingly may, in borrowing money, give such evidences of the amount received as will satisfy the lender, and induce him to make the loan on favorable terms. This right belongs to every debtor, and can hardly be denied to the government of the United States.

The words to "emit bills of credit" were, it is true, stricken from the clause authorizing the borrowing of money when it was debated in the convention; but the vote was, according to Mr. Madison's report, influenced by the belief that the power would be implied.³ Arguments from what is said in the course of debate are not safe guides in the interpretation of any law or charter, and least of all, as regards the Constitution of the United States; for, as it became law through the ratification of the conventions chosen in the several States, to know what they approved we must look to the perfected instrument, and not to the steps by which it was wrought out. Otherwise the door is thrown open to conjecture, and a latitude given which may be abused in turn by every party. To assign the conflicting views of the delegates, who sat with closed doors in Philadelphia, as a reason for not following the natural import of the instrument which they drew and the people of the United States adopted, is not unlike interrogating the conveyancer as to his purpose

¹ *The Veazie Bank v. Fenno*, 8 Wallace. See *ante*, p. 269.

² *Gibbons v. Ogden*, 9 Wheaton, 1. See *ante*, p. 425.

³ 1 Elliott's Debates, pp. 845, 870; *Legal Tender Case*, 110 U. S. 421, 443.

in writing the deed. When the question is political, not whether the power exists, but should it be exercised in the way proposed, a different rule prevails, and the opinions of the statesmen who have passed away may properly influence their successors.

If what was said by the legislators is entitled to any weight in the construction of a statute, it can only be as a commentary, depending for its effect on the truth and force of the reasons assigned by the speakers.

So far the argument from the power to borrow is indisputable; but there is a long interval from these premises to holding that the proofs that a debt exists may, if the creditor thinks fit, be used as a means of discharging the obligations which he has incurred to third persons. Bills of credit, and bonds payable to bearer, may be issued and perform the office of money by general consent, as long as the credit of the government holds good; but this may be said of the notes of an individual, or a body corporate. To make them money, something more must be done; they must be rendered a legal tender, or, what comes to the same thing, must, like coin, have a value which is established by law, and indisputable. How the right to borrow money warrants such a result cannot readily be understood. Such a power carries with it an implied right to give notes, with which the lender may satisfy his creditors if they consent; this is the premise. Therefore the lender's creditors may be compelled to take the notes in payment, though they distrust the borrower; this is the conclusion. Can it be described as just or logical?

The difference between the right to emit bills as a means of borrowing, and the right to render them a legal tender, was shown with great clearness in the dissenting opinions of Davis and Selden, JJ., in the *Metropolitan Bank v. Vandyck*,¹ on grounds which, if the question is still open, may be deemed unanswerable. A majority of the court were, however, of opinion that the government may, in borrowing money,

¹ 23 New York, 400.

make the bonds or notes which it gives for the amount lent compulsorily receivable by third persons; and this view was subsequently adopted when the question came before the Supreme Court of the United States.¹ Such a construction virtually empowers Congress to levy forced loans and benevolences. True, the money is not taken by force from the lender, but he is authorized to compel his creditors to accept the credit of a government which they perchance distrust, and surrender the real and personal securities which he pledged for the debt. It will, I suppose, be conceded that Congress could not require the holder of a mortgage to assign, or hand it over to the government, in return for the bonds or notes of the United States. Such an act would be taking private property for a use which is not specific, or within the scope of the right of eminent domain, or a legitimate application of the power to borrow money.² Is the case materially different when the object is attained indirectly, by enabling the mortgagor to satisfy the mortgage with a note given for the money which he lends to the government. In either case the mortgagee is deprived, not merely of a chose in action, but of property which is as much his for all the purposes of obtaining payment as if it were conveyed absolutely. Such an enactment violates the fundamental principle that A's property shall not be transferred without his consent to B, directly, or by authorizing B to take it in exchange for something which A is not willing to receive.³

It might have been thought that when deducing the right to make paper money a legal tender from the power to borrow was held to involve such consequences, it would have been abandoned, as leading to an untenable conclusion. But in the Legal Tender Cases Bradley, J., frankly described "the power of the government to borrow money" as "a power to be exercised with the consent of the lender if possible, but to be exercised without his consent if neces-

¹ See The Legal Tender Cases, 12 Wallace, 457; *Juillard v. Greenman*, 110 U. S. 421.

² See *ante* p. 333.

³ See The Legal Tender Cases, 12 Wallace, 456, 580.

sary." It followed that "when exercised in the form of legal tender notes, or bills of credit, it may operate for the time being to compel the creditor to receive the credit of the government in place of the gold which he expected to receive from his debtor." The greater contains the less, and the premise cannot be admitted without accepting the conclusion; but it is a premise which would have been deemed inadmissible until within the last twenty years. During the long interval between Magna Charta and the adoption of the Constitution, few things were more odious to the English race than the extortion of money as a loan. If it is not a deprivation within the meaning of the Fifth Amendment nothing is a deprivation. It is not analogous to the right of eminent domain, because that can be exercised only where property is specifically appropriated to some need which cannot be satisfied in any other way.¹ Nor is it taxation, which bears equally on all in proportion to their means. It is more nearly confiscation, subjecting the few to a burden which should be shared by all. No one contends that the Treasury can be replenished by seizing land or goods and converting them into money; and choses in action are as much property as things in possession.² If forced loans are constitutional, there must be some means of compelling the citizen to obey; he may, like Hampden, be imprisoned, or his property may be distrained and sold under a writ issued by the Exchequer or the commissioners appointed to carry the law into effect. The thing is equally objectionable whatever means are employed.

The Legal Tender Acts have also been held to be impliedly authorized by the power to wage war, but they do not seem to be so related as to justify the inference.³ Issuing paper money and making it compulsorily receivable may afford the means of raising armies, procuring supplies, and conducting a campaign; but the same may be said of forced loans, or any other form of confiscation. Declaring

¹ See *ante*, p. 333, 346.

² See *ante*, p. 824.

³ See the *Metropolitan Bank v. Vandyck*, 27 N. Y. 400, 425; The *Legal Tender Cases*, 12 Wallace, 549.

war does not convert a free government into a despotism, or justify the conversion of private property to public use, except to supply some immediate and specific need.¹

There is, nevertheless, an aspect of the question which should not be overlooked.

The power to borrow money, as I have already intimated, is associated with others which, like it, cannot be effectually exercised by any nation that is powerless to control the currency, and is consequently liable to be hindered in the performance of its functions by banking companies, or bodies corporate who have the authority which it lacks. A government authorized, and when the occasion requires it bound, to raise and maintain armies, to build and fit out fleets, to pay the salaries of legislators, ambassadors, clerks, and other public functionaries, and to raise money by taxation, and if necessary by loans, to meet these and the various other expenses which the civil and military administration of government demands, is by an implication which cannot be withstood also authorized to create and issue money, as the one indispensable means, without which its express authority must remain a dead letter. No tax can, for instance, be laid or collected without some standard according to which it is to be paid; and the establishment of a currency is therefore an essential pre-requisite to raising money by taxation. If it be said that taxes might be laid in kind, or paid in the foreign coin which would flow in if no currency were provided by law, the answer is that this would be attended with too many inconveniences to be adopted in practice, and therefore cannot be supposed to have been contemplated by the framers of the Constitution. "To designate or appoint the money in which taxes are to be paid is therefore not only a proper, but a necessary exercise of the power of collecting them."² In like manner the defence of the country in war is the paramount duty of the government, as it is the virtue of the citizen; and when a duty of so much moment is enjoined, the means for its performance must be presumed to be given. It were needless to enlarge on the

¹ See *ante*, p. 917.

² Hamilton's Works, vol. iii. p. 208.

obvious proposition that money, always a chief element and means of success in war, is now made doubly so by the advance of science ; but it is important to observe that no great and protracted war has been waged in modern times without a recourse to loans, and that loans cannot be effected without a full and abundant supply of money. A country obliged to rely at such a crisis, for an element so essential as the currency, on a casual supply from abroad, or the good-will of corporations or bankers over whom it had no control at home, would find itself powerless in the hour of danger, and might perish in the first severe trial to which it was exposed. This is the more true because credit fails and money disappears from its accustomed channels at the approach of war and insurrection, and the facilities for obtaining money diminish as the need of it is greater. This evil, which rose to an alarming height during the war of 1812 with England, and recurred with each financial crisis, could not, as Madison and Calhoun pointed out, be remedied except by a national paper currency issued directly, or through a bank established for the purpose.¹

The conception of a government entrusted with the task, not only of raising money by taxation, to provide "for the common defence and general welfare," and yet wanting the right to create and regulate the currency, is fallacious. It would have been disavowed by the statesmen who framed the Constitution, and will not be entertained by any one who reflects on the consequences that would flow from its adoption. The nation is threatened with a war ; large sums are wanted on a sudden to make the requisite preparations ; taxes are laid for the purpose, but it requires time to obtain the benefit of them ; anticipation is indispensable. With the power to issue money, the supply can at once be had ; if there be none, loans must be sought from individuals. The progress of these is often too slow for the exigency ; in some

¹ See Madison's Message of Dec. 5, 1815, recommending a national bank, and Mr. Calhoun's report, as the chairman of the committee to which so much of the message was referred. Webster's Works, vol. iii. pp. 346, 350.

situations they are not practicable at all. Frequently when they are, it is of great consequence to be able to anticipate the product of them by issuing bills of credit and making them a legal tender. The truth and force of this illustration, borrowed, with a change of application, from the works of Hamilton, will be admitted by all who recall the lesson taught by history, that the country could not have escaped from the sudden and imminent peril to which it was exposed by the outbreak of the Rebellion but for the power of anticipating its resources, and obtaining the command of the money market by issuing a currency which it could control, and that could not be controlled by others.

It has been said that, indispensable as a well-ordered financial system may be to the effectual prosecution of hostilities and the collection of the revenue, it is not related to the power to wage war or the power to tax, and cannot justly be said to form any part of the authority which they confer. In considering this argument we should recollect that every mandate carries with it the right to use all necessary means for the performance of the duty imposed on the mandatary. This is true of a private agency, and applies with more force to a government endowed with sovereign powers, and acting within their scope as the representative of a nation. It was on such grounds that the right to acquire territory by cession was deduced under Jefferson from the treaty-making power, and gave birth to the right to govern the province so acquired.

Without going to the extent of holding that wherever a duty is imposed by the Constitution it also gives the means of carrying it into effect, we may be of opinion that in interpreting any instrument each clause should be so construed as to render every other effectual. If the clauses above referred to do not involve the plenary control over the currency which is essential to their execution, they presuppose its existence, and give rise to a natural presumption that the deficiency is supplied in some other paragraph of the Constitution.

The Constitution, accordingly, confers another power, which

may be exercised alike in peace or war, and would seem to involve the right to regulate the currency, not as incidental or ancillary, but as a part of its essence and an appropriate means of carrying it into effect. By the third clause of the seventh section of the First Article of the Constitution, Congress are authorized to "regulate commerce with foreign nations, among the several States, and with the Indian tribes." So vast is the subject of this power, and so much does it comprise, that its limits cannot well be defined without the risk of excluding something which may in some form, or at some time, deserve to be included.¹ It is given in the largest and most liberal terms, without restriction or limitation, and has been interpreted and applied with adequate, if not with equal, liberality. It confessedly and directly includes traffic, — the sale and exchange of commodities, — but also extends to the means by which traffic is carried on. Every species of commercial intercourse is within its limits, and they comprehend trade among the States as well as with foreign nations. It is complete in itself, acknowledging no limitations other than those which the Constitution prescribes, and does not stop at the boundaries of the States, but may be exercised within as well as without their jurisdictional lines.²

These principles were established by Chief-Justice Marshall in *Gibbons v. Ogden*; ³ and he also held that "commerce," as the word is used in the Constitution, is a unit, every part of which is indicated by the term, and that its meaning must be the same throughout the sentence, in the absence of some plain, intelligible cause of change.

Whether the power to regulate commerce comprehends each of the isolated transactions of which trade is necessarily made up, and would justify the enactment of a code embracing commercial contracts between the citizens of different States and with other countries, is a point which has not been judicially decided, although the expediency of such

¹ See *The United States v. Marigold*, 9 Howard, 560, 566.

² See *Pennsylvania v. Wheeling Bridge Co.*, 13 Howard, 518; 18 Id. 421, 431. See *ante*, p. 491.

³ 9 Wheaton, 1, 189, 193. See *ante*, pp. 108, 427, 432.

legislation would seem to be more questionable than its constitutionality. But it is established that the authority of the United States is supreme over commerce in the aggregate, and the means by which the operations of commerce are prosecuted, and that the commercial intercourse of the States with each other and with foreign nations must be in due subordination to the rules which may from time to time be prescribed by Congress.¹ As ships are among the most important means of commerce, the legislative power of the General Government has been largely exercised over shipping for the purpose, not only of ascertaining the national character of the vessels sailing under the flag of the United States, but for that of defining the relations between the master and crew, and preserving discipline and good order while in port and during the course of the voyage. As soon as—and, indeed, for some purposes before—a ship is launched it comes within the jurisdiction of Congress, who may require her to be registered, and prescribe the mode and place in which the registry shall be made, control the plan and details of her construction and equipment, declare the manner in which the contracts of the crew shall be drawn, enlarge or limit the authority of the master over the seamen, affix penalties for desertion and enforce them summarily, declare that the bill of sale, or instrument by which the title is conveyed, shall be recorded, and, finally, prescribe the conditions under which every vessel that leaves the shores of the United States must sail, or retain it in port by an embargo or suspension of commercial intercourse of indefinite duration. These powers have in various forms been exercised from the outset of the government; most of them have received the sanction of the courts; and they all form part of the well-recognized and generally conceded authority of Congress.²

What has been said of shipping applies in a greater or less degree to everything which constitutes a means of commercial intercourse, or on which the operations of trade depend

¹ *Corfield v. Coryell*, 4 W. C. C. 371. See *ante*, pp. 430, 434.

² See *ante*, pp. 108, 428, 429, 434.

for success and safety. Commerce cannot be well or safely prosecuted without signalling the dangers that lie in the path of the mariner by buoys, guiding him through the obscurity of the night by beacons, facilitating the entrance of his vessel into port by the removal of obstructions, and protecting it while there by piers and breakwaters; and hence the expenditure of money for these purposes is confessedly within the implied powers of Congress, although not given expressly nor absolutely necessary for the regulation of trade.¹ Of all that goes to make up the sum, or contributes to the successful prosecution of commerce, nothing is so important as the circulating medium, in which every form of traffic that rises above the level of barter must be carried on, without which it would be impossible to buy or sell, to remit the capital requisite for commercial operations to the points where it is wanted, or bring the profits of successful speculation home in safety. All commercial transactions presuppose some standard of value, to which the value of everything else may be referred; and trade cannot be prosecuted in the form in which it exists among civilized nations in the absence of such a criterion, nor unless it is sufficiently fixed and certain to answer the purpose for which it is designed. Every effort to give regularity to trade which fails to provide for this capital point must be in vain. The commercial legislation of Congress has hitherto been chiefly directed to navigation, not because it is more, but because it is as much a part of commerce as buying and selling.² But the laws that have been passed to secure the safe passage of the ship and cargo across the ocean would be of little value if there were no established currency at the port of destination for which the merchant can stipulate in return for his goods.

In order to test the proposition that a currency in some form is essential to trade, and that the power of Congress to regulate trade cannot be exercised effectually without regu-

¹ Hamilton's Works, vol. iii. p. 189; Webster's Speech on the Sub-treasury, Webster's Works, vol. iv. p. 463.

² Gibbons v. Ogden, 9 Wheaton, 1, 191. See *ante*, p. 424.

lating the circulating medium, let it be supposed that the coinage of money was not authorized in terms, and that in consequence of the unwillingness of the legislature to exercise an implied, in the absence of all express, power such a state of things had arisen in this country as prevailed in England during the reign of William and Mary, when no man who sold could be sure of receiving the price in a form that would enable him to go into the market and buy; when no man who bought could reasonably hope to be able to give anything in payment which the vendor would be willing to receive; when exchange was so much deranged as to interpose an almost insuperable obstacle in the way of trade between different parts of the kingdom and with foreign countries; when, in short, it might, in the epigrammatic language of Macaulay, "be doubted whether all the misery that had been inflicted on the English people in a quarter of a century by bad kings, bad ministers, bad parliaments, and bad judges, was equal to the misery caused in a single year by bad crowns and bad shillings." If under circumstances such as these, but with the additional aggravation that, from the want of all rule on the subject, there was not only no good money, but no legal criterion by which the deficiency in value of bad money could be estimated, Congress had proposed to remedy the universal disorder by coining money, or establishing a uniform circulating medium in some other way, the constitutionality of the measure would in all probability have passed without a question, in view not only of its necessity and expediency, but of the manifest impossibility of regulating commerce without giving certainty and stability to an element which is, more than any other, essential to the safety and regularity of commercial transactions. In the language of Webster, "The regulation of money is not so much an inference from the commercial power conferred on Congress as it is a part of it. Money is one of the things without which in modern times we can form no idea of commerce."¹

¹ Webster's Works, vol. iv. pp. 339, 463. See the *United States v. Marigold*, 9 Howard, 560, 566.

The impracticability of regulating commerce without providing for the regulation of the currency is even more clearly apparent with reference to trade among the States than when that with foreign nations is alone in question. Exchange is a necessary means of trade between places at a distance from each other, and cannot undergo any considerable amount of fluctuation without disturbing the relations of debtor and creditor, and destroying the confidence which lies at the foundation of commercial intercourse. Accordingly, exchange, and the bills and drafts by which the operations of exchange are effected, must be presumed to be subject to the constitutional power of Congress.¹ As exchange is the sale of an amount due in one place for value received in some other, or, as it was comprehensively defined by Webster, "a transfer of funds," it must necessarily be attended with inconvenience and loss, unless the local currency is the same in both, or can be reduced to a common standard; and every branch of internal commerce was repeatedly disordered during the fifty years preceding the Civil War from the want of the uniform circulating medium which the United States finally supplied. The bank-notes which had supplanted specie might pass current in the place where they were issued, but ceased to be money and became articles of merchandise a few leagues farther on; and the inconvenience which this occasioned was felt by every one who had debts to pay or purchases to make in another part of the Union.² The need of guarding against these evils was one of the grounds on which the constitutionality of a national bank was vindicated by Hamilton; and the argument applies with equal if not greater force to the laws making treasury notes a legal tender and the basis of a uniform currency throughout the United States. For if Congress could, as the first Secretary of the Treasury held, incorporate a bank with a view to the creation of a convenient medium of exchange between the States and preventing the displacement of the metals, they

¹ Hamilton's Works, vol. iii. pp. 204, 213.

² Webster's Works, vol. iv. p. 335. See *ante*, p. 277.

may obviously accomplish the same object directly, instead of acting through the channel of a corporation.¹ "Money is the very hinge on which commerce turns. And this does not mean merely gold and silver. Many other things have served to the purpose with different degrees of utility. Paper has been extensively employed. It cannot, therefore, be admitted, with the Attorney-General, that the regulation of trade between the States, as it concerns the medium of circulation and exchange, ought to be considered as confined to coin. It is even supposable that the whole or greater part of the coin of the country might be carried out of it."² What was thus foreshadowed, subsequently, as we all know, occurred. By a natural growth, and through State legislation rather than with the sanction of the General Government, bank-notes virtually supplanted coin; and the power to regulate commerce, being necessarily co-extensive with the medium in which commercial operations are performed, and enlarging as that varies, must be exercised with reference to the species of circulation with which the channels of trade are actually filled. "If Congress has the power to regulate commerce, it must have a control over that money, whatever it may be, by which commerce is actually carried on. Whether that money be coin or paper, — if in fact it has become the actual agent or instrument in the performance of commercial transactions, — it necessarily thereby becomes subject to the control and regulation of Congress."³

This view was enforced with unanswerable logic in Webster's speech on the currency during the suspension of specie payment in 1837. As he there observed, in language borrowed from Mr. Dallas's report as Secretary of the Treasury, "whenever the emergency occurs that demands a change of system, it seems necessarily to follow that the authority which was alone competent to establish the national coin is alone competent to create the national substitute." If further

¹ See Madison's Messages to Congress, Dec. 5, 1815, Dec. 3, 1816.

² Hamilton's Works, vol. iii. p. 213.

³ Mr. Webster's Speech on the Currency, Sept. 28, 1837, Webster's Works, vol. iv. pp. 324, 339.

authority is wanting on a proposition which may be thought self-evident, it may be found, as I have elsewhere shown, in the concurrent testimony of the statesmen who were best able to express such an opinion on such a subject.¹

¹ See *ante*, p. 1249. "This power over the coinage is not the strongest nor the broadest ground on which to place the duty of Congress. There is another power granted to Congress, which seems to me to apply to this case directly and irresistibly; and that is the commercial power. The Constitution declares that Congress shall have power to regulate commerce, not only with foreign nations, *but between the States*. This is a full and complete grant, and must include authority over everything which is part of commerce or essential to commerce. And is not money essential to commerce? No man in his senses can deny that; and it is equally clear that whatever paper is put forth with intent to circulate as currency, or to be used as money, immediately affects commerce. Bank-notes, in a strict and technical sense, are not, indeed, money, but in a general sense, and often in a legal sense, they are money. They are substantially money, because they perform the functions of money. They are not, like bills of exchange, or common promissory notes, mere proofs or evidences of debt, but are treated as money in the general transactions of society. If receipts be given for them, they are given as for money. They pass under a legacy, or other form of gift, as money. And this character of bank-notes was as well known and understood at the time of the adoption of the Constitution as it is now. The law both of England and America regarded them as money in the sense above expressed. If Congress, then, has power to regulate commerce, it must have a control over that money, whatever it may be, by which commerce is actually carried on. Whether that money be coin or paper, or however it has acquired the character of money or currency, if in fact it has become an actual agent or instrument in the performance of commercial transactions, it essentially then becomes subject to the regulation and control of Congress. The regulation of money is not so much an inference from the commercial power conferred on Congress as it is a part of it. Money is one of the things without which in modern times we can form no practical idea of commerce. It is embraced, therefore, necessarily in the terms of the Constitution." Webster's Works, vol. iv. p. 338.

It is proper to add that on a former occasion Webster as explicitly declared: "There is no legal tender, and there can be no legal tender, in this country under the authority of this government, or of any other, but gold and silver, the coinage of our own mints, or foreign coins at rates regulated by Congress." Webster's Works, vol. iv. p. 271. But it may still be thought that in maintaining the right of Congress to create and regulate a national currency consisting mainly of paper, he laid down a premise which naturally, if not necessarily, leads to the conclusion which he so emphatically repudiated.

It has, however, been contended that if we may reason from the duties imposed by the Constitution to the means requisite for their fulfilment when the Constitution is silent, this ceases to be true when a particular method is pointed out; and it must then be pursued to the exclusion of every other. Viewed in this aspect, the power to coin money ceases to be a mere authority, and becomes a prohibition. In saying expressly that a currency may be created of a particular kind, it says impliedly — if this argument is sound — that a currency shall not be created of any other kind. Read by itself, the power to regulate commerce might authorize the regulation of the paper money through which the operations of trade are carried on, by means analogous to those used in other countries and appropriate to the end. The able opinion of Judge Sharswood, in *Borie v. Trott*,¹ concedes this much, and it will hardly be denied by any candid mind; but it has been said that inasmuch as a specific power to coin money and declare the value thereof is expressly conferred, it must be regarded as limiting the unqualified power over commerce. This seems to me to be the very latitude of strict construction. The enumerated powers may not be read together when the object is to show that the scope and object of the instrument require a liberal interpretation, or that a particular power must fail unless an enlarged view is taken of another power. They may be read together for the purpose of limiting one affirmative clause by the language of another which is in terms enabling, and contains no prohibitory words. Such a rule would hardly be applied in the construction of any other instrument. When, indeed, a general grant is followed by an enumeration, the latter may control and exclude everything that is not specifically set down. But it is equally true that when authority is conferred in general terms, without exception, reservation, or limitation, no part of it should be withheld on a mere conjecture or inference. Such is the case actually before us; because the power to regulate the currency is confessedly as

¹ 5 Philad. 366, 395.

much a part of the power to regulate commerce as the power to regulate navigation, and incidentally thereto the navigable waters of the United States; and as Chief-Justice Marshall observed, nothing should be withdrawn by implication from the operation of a grant which in terms conveys the whole. If the maxim *expressio unius exclusio est alterius* were more nearly in point than it would seem to be, care should still be used in applying it to an instrument like the Constitution of the United States. Where parties are dealing at arms' length, each presumably intending to get as much and give as little as he can, it may be just to infer that words of designation or indication are also words of limitation, and exclude everything which they do not sanction; although even here the rule is not universal. But when the object of the instrument is to confer a power for beneficial purposes, when it has its origin solely in the will of the grantor, and his good is the end in view, the designation of a specific means will not preclude a recourse to others. This is especially true when the grant is made by a people, and designed to create a representative government, chosen by them and exercising its authority for their benefit; because the subject of the gift would be useless if retained, and must be placed in trust in order to be valuable to the givers.¹ The inclination should, therefore, be towards a liberal rather than a narrow interpretation, especially when it is remembered that the Constitution was intended, like Magna Charta, "to live and take effect in all successions of ages forever,"² and consequently "to be adapted to the various crises of human affairs." "To have prescribed the means by which the government should in all future time execute its powers, would have been an unwise attempt to provide by immutable rules for exigencies which if foreseen at all must have been foreseen but dimly, and which can best be provided for as they occur."³

All that can safely be inferred as regards such an instrument from an authorization to use a particular means is not

¹ See *McCulloch v. Maryland*, 4 Wheaton, 316, 415.

² 2 Institutes, 2.

³ *McCulloch v. The State of Maryland*, 4 Wheaton, 316-415.

that other means are forbidden, but that this should, if the occasion requires it, be used. *Prima facie*, affirmative words enable; they cannot, unless imperative, prohibit. If, indeed, the express authority be the only one, and there is no express or implied power elsewhere, it must be pursued, and every step beyond its limits will be void. But it will not create a disability by implication, or take from other powers the scope which they would have if standing alone. If, therefore, Congress could legally establish a currency, and decide upon its nature, by virtue of their power to regulate commerce, wage war, and levy taxes, they may do so notwithstanding the express authority conferred upon them to coin money. The powers of government are in a great degree co-extensive; they cannot be divided by sharp and arbitrary lines; and much that belongs ordinarily to one may be found at some time and for other purposes equally pertinent to another. Hence, while the grant of a specific power will not warrant acts not appropriate to it, and appertaining to a power of a different description, still, when a power is given absolutely, no part of the authority necessary to its execution should be presumed to have been withheld because it is associated with another power partially covering the same ground, and limited in terms or as to the means of carrying it into effect. Some governmental functions, as, for instance, that of "establishing post-offices and post-roads," conduce directly to the general good, which is the ultimate end of all; others, like the power of taxation, are useful only as furnishing the means by which the operations of government must be performed. But the greater number hold an intermediate position, and are primary or subsidiary means or ends, according to circumstances. "Many particular means are involved in the general means necessary to carry into effect the powers granted by the Constitution; and when this is the case the general means becomes the end, and the smaller objects the means." Even, therefore, if Congress can only use one means — that of coinage — when the creation of a currency is the sole as well as the immediate object, it would not follow that no other means could be resorted to

when the object is to create a currency, not for its own sake, but with a view to the execution of other powers that must otherwise fail.

This conclusion derives additional strength from the reflection that when the government was established, the currency consisted almost exclusively of specie. The States were forbidden to issue bills of credit; and there were probably few persons who anticipated that bank-notes would, through State legislation, become the chief circulating medium of the country, and the only one at the command either of individuals or the government during the periodical suspensions of specie payments. And the framers of the Constitution may be supposed to have intended that so long as the state of things which prevailed in their time remained unchanged, the legal character of money should belong exclusively to coin. But they must at the same time, as men who had undergone the vicissitudes of the Revolution, have been aware that the currency should, like other things, be adapted to circumstances, and that the safety of the country might, at some period in the unknown future, demand measures which would not be advisable in ordinary times. They knew that the loss occasioned by continental money was the price paid for the Declaration of Independence, and that the future might involve contingencies as perilous, and requiring measures not less extreme. Hence, in all probability, a determination on their part not to carry the express power of Congress over the currency beyond the coinage of specie, and yet leave the implied power to create and issue money in any form that the performance of the functions of the government might ultimately demand in full force and unembarrassed by restrictions. If such was their design, the result has shown it to be eminently wise, because an authority confined to specie would be inadequate in a country where, from causes beyond the control of the General Government, bank-notes have long been the chief, and sometimes the only, circulating medium, and will not, as experience has shown, prevent the paper currency from varying so much in value as to throw a formidable obstacle in the way of the collection of the revenue and

the course of exchange between different sections of the country.

Aside from argument, it would seem to be settled on authority that the grant of an express power in an instrument like the Constitution does not necessarily preclude the exercise of a more general implied power of a like nature, and including the express power within its limits. The power of the government of the United States to inflict punishment for crime is, as we have seen, limited in terms to treason, to piracies, and felonies committed on the high seas, to offences against the law of nations, and to counterfeiting the securities and current coin of the United States; and yet there can be no doubt that every violation of the laws of the United States may be made criminal by Congress.¹ In like manner, although the Senate and House of Representatives may, by the express words of the Constitution, "punish a member for disorderly conduct," they are not thereby precluded from punishing contempts committed by third persons.² In the *United States v. Marigold* the express power given in the Constitution "to provide for the punishment of counterfeiting the securities and current coin of the United States" was held not to preclude Congress from punishing the offence of uttering counterfeit coin, or that of counterfeiting the coin of foreign countries; and in *McCulloch v. The State of Maryland*,³ Chief-Justice Marshall said that he would be taxed with insanity who should contend that because the oath which might be exacted — that of fidelity to the Constitution — was prescribed, the legislature could not super-add such other oath of office as its wisdom might suggest. It cannot be held consistently with these authorities that the grant of a limited power will restrain or prohibit the use of a larger authority conferred in another part of the instrument by implication.

It has, indeed, been said that if trade cannot be success-

¹ *McCulloch v. The State of Maryland*, 4 Wheaton, 316, 416; *United States v. Marigold*, 9 Howard, 560, 568. See *ante*, pp. 116, 1148.

² *Anderson v. Dunn*, 6 Wheaton, 204.

³ 4 Wheaton, 416.

fully prosecuted among the different States without some standard of value, and the creation of a currency is a first and indispensable step towards the regulation of trade, still the power to issue money is an attribute of sovereignty, and the government of the United States does not possess any sovereign attribute which has not been conferred in terms. But this argument overlooks that the federal government is, within the circle of its functions and with regard to the objects intrusted to its care, as fully and completely sovereign as any government of ancient or modern times.¹ Were not such the case, it would not answer the end for which it was created, or be a fit representative of the people of the United States in their sovereign and national capacity. The difference between it and other governments is not in the degree of its sovereignty, — which would place the American people, who can speak only through its voice, in a position of inferiority among the nations of the earth, — but that the authority which it possesses is limited to certain objects, and cannot be exercised over anything beyond their sphere. Although some powers have been withheld from its grasp and bestowed elsewhere, those which it wields are not in any just sense of the word limited, and on the contrary extend as far as may be necessary for the accomplishment of the purposes for which they were given. This is not only implied from the whole tenor of the Constitution, but directly asserted in the clauses authorizing Congress to pass all laws necessary and proper for the execution of the powers of the government, and declaring the Constitution and the laws made in pursuance thereof to be the supreme law of the land, notwithstanding anything to the contrary in the Constitutions or laws of the States.² The validity of an issue of money, or of any other measure which the legislature may adopt, depends not so much on the letter of the Constitution

¹ *McCulloch v. The State of Maryland*, 4 Wheaton, 316, 403; *Hamilton's Works*, vol. iii. 182.

² *Ableman v. Booth*, 21 Howard, 506, 517; *The Bank of Commerce v. New York City*, 2 Black, 620, 632. See *ante*, p. 99; *Hamilton's Works*, vol. iii. 182.

as on whether it is a fit and necessary means for the performance of the duties which the Constitution enjoins.

The principle was stated and applied with equal force and clearness in Hamilton's response, while Secretary of the Treasury, in obedience to the call made by Washington on the members of his cabinet for a statement of their views with regard to the constitutionality of the Bank of the United States: "The specified powers of Congress are in their nature sovereign; it is incident to sovereign power to erect corporations; and therefore Congress have a right, within the sphere and in relation to the objects of their power, to erect corporations." This demonstration shows that the power to make all necessary and proper laws for the execution of the powers of the government would have resulted from the spirit of the Constitution if it had not been conferred in terms; and it seems to be a necessary corollary that Congress may issue money in any form which the occasion requires; because this power is not only an attribute of sovereignty, but an attribute which bears a direct relation to the powers specifically conferred by the Constitution.

No one who reads this admirable state paper with the attention which it merits can be surprised that Washington should have deemed it a conclusive answer to the reasons adduced on the other side; and the course of legislation and decision has since amply vindicated the wisdom of the views which it presents, and shown that they are the only ones on which the government can be carried on and made effectual for the purposes for which it was established.

The argument may be summed up as follows: The currency had changed its character since the Constitution was established, and was running through different channels and with an augmented volume. It had thus escaped from the control of Congress, and passed into the hands of the States, —or rather of the corporations which the local legislatures had chartered, but were unable to direct. The bank-notes issued by these institutions took the place of gold and silver, which became rare, and might be withdrawn. The power to coin money and regulate the value thereof was obviously inade-

quate to the altered state of things.¹ The money which it supplied was not the money in general use. It might be uniform, but this did not prevent a great and injurious fluctuation of the paper currency. Two different courses were open to Congress. They might stand fast within the limits of the coinage power, and by so doing relinquish an important function, and one necessary for the performance of every other; or they might, under the general power over commerce, regulate the currency through which trade was actually carried on. They chose the latter alternative; and history will, I think, declare that their decision was in accordance with the Constitution, and the only one that could be made in view of the great and difficult task of conducting the people of the United States through a civil war unparalleled in magnitude and in the demand made upon the national resources.²

¹ See *ante*, p. 268.

² "There had been an extraordinary revolution in the currency of the country. By a sort of under-current, the power of Congress to regulate the money of the country had caved in, and upon its ruin had sprung up those institutions which now exercised the right of making money in and for the United States; for gold and silver are not the only money, but whatever is the medium of purchase and sale, in which bank-paper alone was now employed, and had therefore become the money of the country. A change of great and wonderful import has taken place, which divests you of your rights and turns you back to the condition of the Revolutionary War, in which every State issued bills of credit, which were made a legal tender, and were of various values. We have in lieu of gold and silver a paper medium, unequally but generally depreciated, which affects the trade and industry of the nation, which paralyzes the national arm, which sullies the faith, both public and private, of the United States. According to estimation, there were in circulation within the United States two hundred millions of dollars of bank-notes, credits, and bank-paper in one shape or other. Supposing thirty millions of these to be in possession of the banks themselves, there were perhaps one hundred and seventy millions actually in circulation, or on which they draw interest, while there were not, according to estimation, in the vaults of all the banks more than fifteen millions in specie." See Calhoun's Speech, Feb. 26, 1816, in support of the Bill for the Establishment of the Bank of the United States, and his Report as Chairman of the Committee to which that measure was referred, as cited in Webster's Works, vol. iii. pp. 318, 461.

LECTURE LVIII.

The Legal Tender Acts approved by the Secretary of the Treasury and passed by Congress. — So much of this Legislation as consisted in issuing United States Notes, and suppressing the Notes of the State Banks, sustained by the Supreme Court; but rendering Paper Dollars a Legal Tender held Unconstitutional by a Majority of the Judges. — Reasons for this Decision as assigned by the Chief-Justice. — The words Necessary and Proper, like the Tenth Amendment, are at once Admonitory and Directory. — An implied Power must be appropriate, and consistent with the Spirit of the Constitution. — In his opinion, the Legal Tender Acts not only impaired the Obligation of Contracts, but operated as a Deprivation without due Process of Law. — The Answer to this view is, that Contracts for the payment of Money are presumed to be made in Subordination to the Power of Congress over the Currency, and with notice that it may be exercised.

THE defects of a financial system where there was no central or controlling power, and where the banks of each State vied with those of every other in issuing an inflated currency which they frequently could not redeem, were too obvious to escape the attention of the eminent men who during the first half of the century stood near the helm of government; and Madison, Dallas, Calhoun, and Webster in turn insisted on the necessity of remedial legislation.¹ Cogent as were the reasons which they assigned for rendering the currency uniform, and adequate in other respects to the public wants, they might not have moved Congress but for the logic of events. The American people, politically, are disposed to

¹ See *ante*, p. 1249; also *The Metropolitan Bank v. Van Dyck*, 27 N. Y. 431-433.

follow the beaten ways; and the powerful influence of the State banks tended against any change that would disturb their possession of the field. The lesson which financial disaster had failed to teach was learned from the Civil War, which made the necessity for reform so plain that the only doubt among persons who were well affected to the government was as to the possibility of devising a plan which would be at once adequate to the occasion and consistent with the limits set by the Constitution. The right to create a paper-currency by the emission of bills of credit was generally conceded; but there was a divergence of opinion as to the measures which should be taken to fix and regulate their value when uttered. Great as was the urgency, all agreed that the laws made for this purpose must, as the enabling and restrictive clause sanctioning ancillary legislation implies, be necessary and proper, that is related to the end, and such that, unless they or some analogous measure were adopted, it could not be effectually attained; but it was as generally conceded that in considering what was necessary, regard should be had to the existing state of things.

No statesman would have attempted to create a currency in the face of the Civil War simply through the power to coin money and declare the value thereof, because specie disappeared faster than it could be issued. Nor would he have recurred to the expedient of a single national bank, acting independently of the government, and able to contract or expand the circulation at will. It was obviously necessary to devise some new method which would promptly replenish the exhausted treasury, fill the channels of trade, and enable the government to meet the enormous expenditure requisite for the suppression of the insurrection which had established a *de facto* government in the Southern States, and was menacing Washington. After mature consideration, Congress passed the first of the series of measures known as the Legal Tender Acts. It was approved by the President, Feb. 25, 1862, and became the basis of a currency which not only carried the country through the Civil War, but gave it on the return of peace a financial strength and stability that

had been unknown for more than half a century.¹ The bill was passed with the concurrence of the Secretary of the Treasury, Mr. Chase, who not only advocated the emission of treasury notes, but informed the committee of the House of Representatives that it was necessary to make them a legal tender. This last-named feature was opposed at the time as an abuse of the discretion which must, even under our system, be accorded to the legislature, and became the theme of an unsparing criticism, in which Mr. Chase joined when subsequently elevated to the chief-justiceship.

The new system was generally sustained by the State tribunals, not merely because they regarded it as constitutional, but from a justifiable wish not to discredit a measure which had been adopted at a critical period as essential to the preservation of the republic. When, however, the case came before the Supreme Court of the United States in *Hepburn v. Griswold*,² the result disappointed the expectation that the Chief-Justice would uphold the statute which he had approved as Secretary of the Treasury. Two questions were mooted at the bar and on the bench,—Did the act fall within the scope of the express or implied powers of Congress? Was it constitutionally applicable to pre-existing contracts? On both heads judgment was given by a divided court in favor of the creditor's demand for specie.

Such a conclusion was the more singular because the judges agreed on so many points that it might have been thought they would have no difficulty in arriving at the same conclusion with regard to all. It was not denied that the paper currency issued by banking companies chartered by the States was inadequate in peace, and had broken down at the approach of war.³ Specie payments were suspended, and it was not possible for the government or for individuals to make purchases or pay their debts in coin.⁴ It was therefore necessary; and on this point the Chief-Justice con-

¹ See *ante*, p. 267.

² 8 Wallace, 603.

³ See Mr. Webster's Speech on the Currency, of Sept. 28, 1837, Webster's Works, vol. iv. pp. 327, 329.

⁴ James G. Blaine, *Twenty Years in Congress*, pp. 407, 409-425.

curred with the minority, for the United States to follow the counsel which had been given by Hamilton, by Madison, by Calhoun, and by Webster,¹ and regulate the paper currency in which business had long been carried on, and was practically the only one at command of the government or of individuals.² The bills of credit emitted for this end, in the form of treasury or United States notes, could not find their way readily into the channels of trade without the aid of corporations chartered by Congress, and following a uniform rule. The need was so urgent, and the method so much within the scope of the Constitution, that agreeably to the case of *Veazie v. Fenno*,³ Congress might not only create national banks, but lay an impost of ten per cent on the circulation of the State banks, which operated as a penalty, and was intended to drive them from the field.⁴ To this extent

¹ See Hamilton's Works, vol. iii. p. 213; Webster's Works, vol. iv. pp. 343, 348.

² See Mr. Webster's Speech in the Senate on the disorder of the currency during the prolonged suspension of specie payment in 1837, Webster's Works, vol. iv. pp. 327, 329.

³ 8 Wallace, 533. See *ante*, p. 269.

⁴ "In *Veazie Bank v. Fenno* [8 Wallace, 533], decided at the present term, this court held, after full consideration, that it was the privilege of Congress to furnish to the country the currency to be used by it in the transaction of business, whether this was done by means of coin, of the notes of the United States, or of banks created by Congress; and that as a means of making this power of Congress efficient, that body could make this currency exclusive by taxing out of existence any currency authorized by the States. It was said, 'that having, in the exercise of undoubted constitutional power, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate means.' Which is the more appropriate and effectual means of making the currency established by Congress useful, acceptable, perfect, — the taxing of all other currency out of existence, or giving to that furnished by the government the quality of lawful tender for debts? The latter is a means directly conducive to the end to be attained, — a means which attains the end more promptly and more perfectly than any other means can do. The former is a remote and uncertain means in its effect, and is liable to the serious objection that it interferes with State legislation. If Congress can, however, under its implied power, protect and foster this currency by such

the new system was, in the opinion of the Chief Justice as well as of his brethren, so clearly constitutional that the express as well as the implied powers of the government might be exercised to establish it and supersede the old. But he declined to go farther, or admit that Congress could impart the quality of legal tender to the bills of credit which were to take the place of coin. The reasons assigned for this conclusion were substantially as follows: The Constitution is an express grant of general powers, coupled with a further grant of such incidental and auxiliary powers as may be required for the exercise of the powers expressly granted. A large, if not the largest, part of the functions of the government is performed through the powers thus implied. The extension of power by implication was, however, regarded with apprehension by the men who framed and by the people who adopted the Constitution. This appears from the terms in which the incidental and auxiliary powers are granted. They were all included under the general head of "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress, or vested by the Constitution in the government, or in any of its departments or officers." The same apprehension is equally apparent in the Tenth Article of the Amendments, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people."

The court did not mean to say that either of these constitutional provisions is to be taken as restricting the exercise of any power legitimately derived from one of the enumerated or express powers. The object of the first was clearly to exclude all doubt as to the existence of implied powers; and the words "necessary and proper" were intended to

means as destructive taxation on State bank circulation, it seems strange indeed if it cannot adopt the more appropriate and the more effectual means of declaring these notes of its own issue, for the redemption of which its faith is pledged, a lawful tender in payment of debts." See *Hepburn v. Griswold*, 8 Wallace, 603, 636, dissenting opinion of Miller, Swayne, and Davis, JJ.

have a sense "at once admonitory and directory," and to require that the means used to execute an express power should be appropriate to the end.¹

The second provision was intended to have a like admonitory and directory sense, and to restrain the limited government established under the Constitution from the exercise of powers not clearly delegated or derived by a just inference from those which were. It could not be maintained that there was in the Constitution any express authority to make any form of paper currency a legal tender in payment of debts. It was necessary, therefore, to inquire whether this could be done in the exercise of an implied power.

The rule for determining whether a legislative enactment can be supported on the ground of an implied power was authoritatively laid down by Marshall, C.-J., in *McCulloch v. The Bank of Maryland*.² It was established under this decision that to warrant the exercise of an implied power, it must be an appropriate means to an end authorized by the Constitution, and be consistent with its letter and spirit. Did the law making notes of the United States a legal tender for debts contracted prior to its enactment answer these requirements? It could not be doubted that the power to establish a standard of value by which all other values should be tested was, from its nature and necessity, a governmental power. In the United States it was, so far as regarded the precious metals, vested in Congress by the power to coin money. Could a power to impart these qualities to notes, or promises to pay money when offered in discharge of pre-existing debts, be deduced from the coinage power, or any other power, expressly given? It certainly was not the same power as the power to coin money, nor was it in any just sense an appropriate means to the exercise of that power, or of the power to regulate the value of coined money or foreign coins. Nor was the power to make notes a legal tender the same as the power to emit bills of credit to be used as currency. Under the Articles of Confederation Congress

¹ 2 Story on the Constitution, p. 140, par. 1253.

² 4 Wheaton, 421.

were expressly clothed with the latter power, and yet it had never been alleged that they possessed the former. The power to create a currency by issuing bills of credit and treasury notes was established under the recent course of decision;¹ but it did not follow that creditors could be compelled to accept the promises of the government as payment. It had, however, been contended that the power to make treasury notes a legal tender for all debts was an appropriate means to the power to carry on war, to the power to regulate commerce, and the power to borrow money. It could not be denied that the power to issue paper money might facilitate the prosecution of a war; but if this was a sufficient ground for compelling creditors to accept the notes of the United States in payment, such an authority might be derived from every power which involved the use of money, — from the power to establish post-offices and post-roads, from the power to establish courts for the administration of justice, and from the power to send embassies and provide for their support and maintenance. The argument proved too much, and carried the doctrine of implied powers beyond its appropriate limit. It maintained that whatever in any degree promoted an end within the scope of a general power might be done in the exercise of an implied power, and that it was for Congress, and not for the court, to determine whether a means was necessary and appropriate to the end. Such a doctrine would completely change the nature of the American government, by converting it into a government of unlimited powers, and obliterate the criterion which Marshall had prescribed for determining whether a legislative act was in accordance with the Constitution. Among appropriate means the legislature had an unrestricted choice; but means which were not appropriate could not acquire that character from an act of Congress. The evils incident to giving a paper currency a forced circulation, by making it

¹ See the *Veazie Bank v. Fenno*, 8 Wallace, 533, 548; *Dooley v. Smith*, 13 Id. 604; *National Bank v. The United States*, 101 U. S. 1, 5; *Juilliard v. Greenman*, 110 Id. 421, 446.

obligatory on creditors, were manifest, and the court were unable to believe that such an expedient was an appropriate and plainly adapted means for the execution of the power to declare and carry on war. These considerations were equally applicable to the power to regulate commerce and the power to borrow money. Both involved the use of money by the government and by the people; but the power of issuing notes, and making them a legal tender in payment of pre-existing debts, was not appropriate to either.

There was another view which the court regarded as decisive. Agreeably to the rule as stated by Chief-Justice Marshall, the power must not only be appropriate, but consistent with the letter and spirit of the Constitution. Was it consistent with that spirit to authorize the payment of debts in a currency unlike that in which they were contracted? Among the great cardinal purposes of the instrument, none was more conspicuous, or more venerable, than the establishment of justice. It was accordingly provided that no State should pass any law impairing the obligation of contracts. It was true that this prohibition did not apply in terms to the government of the United States. Congress had express power to enact bankrupt laws, and the court did not say that a law made in the execution of any other express power would be held unconstitutional because it incidentally impaired the obligation of a contract. But they thought it clear that those who framed and those who adopted the Constitution intended that the spirit of the express prohibition to the States should pervade the entire body of legislation, and the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. A law not made in pursuance of an express power which necessarily and in its direct operation impaired the obligation of contracts must therefore be regarded as at variance with the spirit of the Constitution.

The Fifth Amendment, that private property shall not be taken for public use without compensation, must be considered in the same connection. This provision was akin to

that forbidding laws impairing the obligation of contracts, but was unlike it in being addressed solely to the General Government. It did not in terms forbid legislation appropriating the property of one class or individual to the use of another; yet if such property could not be taken for the benefit of all, without compensation, it was difficult to understand how it could be so taken for the benefit of a part, consistently with the spirit of the prohibition. But there was another clause in the same amendment which could not have its full effect unless construed as a direct prohibition of the law under consideration. It was the declaration that no person shall be deprived of life, liberty, or property, without due process of law. A law contravening this provision would manifestly be invalid. The only question, therefore, was whether an act which compelled persons who had stipulated for payment in gold or silver money to accept payment in a currency of inferior value operated as a deprivation without due course of law. It was clear that whatever might be the operation of such an act, due process of law made no part of it. Did it deprive any person of property? A very large proportion of the property of civilized men exists in the form of contracts. These contracts are generally for the payment of money; and such a contract, before the act in question, was an undertaking to pay the amount in gold or silver coin. It could not be denied that the holders of such obligations were as fully entitled to the benefit of the Fifth Amendment as the holders of any other description of property. It was, however, said that no form of property was protected from legislation which incidentally impaired its value. The legislature might, for instance, charter a new bank, or railroad company, although the effect was that the value of the stock of existing corporations was thereby impaired. The supposed analogy was, however, fallacious. In one case the injury was purely contingent and incidental; in the other it was direct and inevitable. No one would contend that an act enforcing the acceptance of seventy-five acres of land in satisfaction for a contract to convey one hundred did not come within the prohibition against an arbitrary

appropriation of property. There was no solid distinction between such an act and an act compelling a creditor to accept less or other money than that stipulated for in the bond. It followed that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; and is, on the contrary, not only inconsistent with the spirit of the Constitution, but prohibited in terms.

Miller, Swayne, and Davis, JJ., dissented from the judgment on the ground that the act in question was a necessary and proper means of executing the express powers of the government, and directly related to the power to wage war and suppress rebellion.

The objection taken in *Hepburn v. Griswold* to the Legal Tender Acts, on the ground of their effect on contracts, is questionable, and has been overruled. The chief-justice did not deny that laws made under the express powers of the government may impair pre-existing obligations, or discharge them altogether. So much has to be conceded in view of the power to declare war, of the power to establish a uniform system of bankruptcy, of the power to coin money and declare the value thereof. But he contended that the implied powers of the government follow a different rule, and must not be such in nature or effect as will impair the obligation of contracts, or vary the mode of payment stipulated for by the creditor. Such a distinction introduces a restraint on Congress which the framers of the Constitution studiously omitted. Contracts are regulated by the law of the State where they are made, or the law of the State where they are to be performed, and cannot be varied or controlled by Congress. But the powers of the United States may be carried into execution even when the effect is to impair the obligation of a contract.¹ This is as true of the General Government as it would be of the States if there were no prohibitory words.

¹ *Evans v. Eaton*, 1 Peters, C. Ct. R. 322; *Shollenberger v. Brinton*, 52 Pa., 9, 70; *The Legal Tender Cases*, 12 Wallace, 457, 550.

To hold that a measure designed for great national ends must fail because it incidentally affects an agreement between individuals is contrary to the fundamental conception of government, and subversive of the end for which it is established.¹ The powers of Congress are fewer in number than those possessed by Parliament; but within the scope of its powers, and when no prohibition intervenes, the government of the United States is not less supreme than the English government.² No one contends that the operation of a certificate in bankruptcy is limited to debts incurred subsequently to the passage of the statute, or that a debt contracted sixty years ago may not be paid in current coin, although the gold dollar contains six per cent less gold, and the silver dollar is worth twenty per cent less than it was then. And yet the obligation is impaired retroactively in the one instance, and discharged altogether in the other. So an agreement in New York to open a credit in London will fail if Congress declare war against Great Britain. These, it may be said, are express powers, and may therefore be exercised whether they do or do not affect prior contracts. But an implied power which is necessary and proper for the execution of an express power is as much a part of the principal power as if it was conferred in terms, and therefore not less sovereign.³ A statute, consequently, may be valid

¹ See *The Legal Tender Cases*, 457, 565.

² See *ante*, pp. 99, 575; *Hamilton's Works*, vol. iii. p. 182.

³ Such was the view taken in *Shollenberger v. Brinton*, 52 Pa. 9, 70; and it is sustained by the language held in *The Legal Tender Cases*, 12 Wallace, 549, and the general course of decision. "Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transactions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly, in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo. All such measures may and must operate seriously upon existing contracts; and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that

although the power by virtue of which it is enacted is not enumerated in the Constitution, and its tendency or effect is to impair the obligation of a contract. The embargo which Jefferson promoted suspended, if it did not dissolve, contracts of charter or affreightment, and was characterized by its opponents as a destruction, rather than a regulation, of commerce; and yet the power of Congress to lay an embargo is as well established as that it results by implication from the commercial power.¹ The consignor may be ready to forward the goods, or the owner of the vessel to receive them, but neither can treat the other as in default for a failure to comply with his part of the agreement. So the United

the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair, the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for such distinction. It has no warrant in the Constitution, or in any of the decisions of this court. We are accustomed to speak, for mere convenience, of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, — those necessary and appropriate to the execution of other powers singly described, — are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued; no list of them is made; but they are grouped in the last clause of section eight of the First Article, and granted in the same words in which all other powers are granted to Congress. And this court has recognized no such distinction as is now attempted. An embargo suspends many contracts, and renders performance of others impossible, yet the power to enforce it has been declared constitutional. *Gibbons v. Ogden*, 9 Wheaton, 1. The power to enact a law directing an embargo is one of the auxiliary powers, existing only because appropriate in time of peace to regulate commerce, or appropriate to carrying on war. Though not conferred as a substantive power, it has not been thought to be in conflict with the Constitution, because it impairs indirectly the obligation of contracts. That discovery calls for a new reading of the Constitution.

“If, then, the Legal Tender Acts were justly chargeable with impairing contract obligations, they would not for that reason be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law.” The Legal Tender Cases, 12 Wallace, 457, 565.

¹ *Gibbons v. Ogden*, 9 Wheaton, 1; Legal Tender Cases, 12 Wallace, 457, 550. See *ante*, p. 429.

States ordinarily have no control over the sale or delivery of merchandise ; but it would have been a good defence during the Civil War for the breach of a contract for the exportation of anthracite, that it tended to supply blockade-runners with a fuel which could be used without smoke, and had been forbidden by Congress, or by the President as commander-in-chief. In like manner, while the power to draft is not given expressly, and is a mere inference from the power to raise and equip armies, it necessarily relieves the conscript from every obligation which he may have incurred to do work, or render personal services, that cannot be fulfilled consistently with the duty which he owes to the government ; and yet this was not made a ground of objection in any of the elaborate forensic or judicial arguments against the power.¹

The allegation that Congress cannot vary the standard of the dollar, or render treasury notes a legal tender consistently with the provision that no person shall be deprived of life, liberty, or property without due process of law, would seem to be equally untenable. Sacred as is a man's right to his goods, his land, and, above all, to his home, it will not be allowed to stand in the way of measures that are within the powers of government, and necessary for the public welfare. His property cannot be taken from him, or subjected to a servitude or easement, without payment ;² but acts which are directed to ulterior and beneficial objects are not necessarily unconstitutional because they incidentally impair rights of property.³ This view was carried in Pennsylvania to the extent of holding that an owner was not entitled to compensation for the construction of a steam railway before his door, and the resulting smoke, noise, and

¹ *Kneedler v. Lane*, *ante*, p. 1213.

² See *ante*, pp. 414, 418; *Rigney v. Chicago*, 102 Ill. 79.

³ See *ante*, pp. 385, 390, 419; *Shrunk v. The Schuylkill Navigation Co.*, 14 S. & R. 71, 83; *Chicago v. Union Building Association*, 102 Ill. 380; *Proprietors of Locks v. N. & L. R. R. Co.*, 10 Cushing, 385. See an interesting article on this subject in the *American Law Register* of January, 1888, from the pen of R. Mason Lisle.

cinders, nor for a change of grade which rendered his house inaccessible.¹ These decisions may have been erroneous, because the loss was occasioned by specific acts, which would have been a ground for the recovery of damages as between individuals, and constituted a deprivation without due process of law; but the principle is none the less indisputable where the circumstances admit of its application. A charter is confessedly a contract which the States may not impair; but a State legislature may charter a brewing company one year and forbid the manufacture and sale of beer the next, although the buildings and machinery which the company have erected, and the liquor which they have manufactured, are thereby rendered useless and unmarketable. Such an act of assembly renders the charter nugatory, but does not, agreeably to the Supreme Court of the United States, cause the deprivation which the Fourteenth Amendment forbids, or contravene the prohibition of laws impairing the obligation of contracts, because it is an exercise of the police power operating on all persons, whether natural or artificial, and inflicts no greater hardship on companies than on individuals.²

These considerations apply with greater force in favor of the United States, which have no control over property or contracts save through the exercise of powers that were conferred for national objects. Congress can no more than a State legislature sanction acts which amount to a nuisance where the purpose is not public, and is not attended with compensation;³ but property may be rendered less valuable without "deprivation" in the constitutional sense of the term, whether the deterioration is caused by the government or results from the exercise of the rights of ownership on the adjacent land.⁴ If an act of Congress does

¹ See *ante*, pp. 385, 422.

² See *ante*, pp. 608, 773; *Mugler v. Kansas*, 123 U. S. 623, 634, 669, 670.

³ See *ante*, pp. 413, 756; *The Baltimore & Potomac R. R. Co. v. The Fifth Baptist Church*, 108 U. S. 317.

⁴ See *ante*, p. 397; *Chicago v. The Union Building Association*, 102 Ill. 380.

not fall within one or more of the enumerated powers, it is necessarily void, and we need look no farther. If it does, it may be valid, although it incidentally affects private rights.

Another and conclusive answer is, that since pecuniary obligations are payable in whatever money is lawful, when the time for fulfilment arrives, they cannot be impaired by a statute passed by Congress within the limits of their control over the currency, and ascertaining the monetary units, or dollars, in which payment is to be made. This is confessedly true of coin, and not less true of bills of credit, if they come under the power to issue money and regulate its value.¹

¹ See *ante*, p. 1237; *Schoenberger v. Watts*, 5 Phila. 51; *The Legal Tender Cases*, 12 Wallace, 547.

"The argument assumes two things: first, that the acts do, in effect, impair the obligation of contracts; and second, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that under the acts a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim.

"But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals; but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other, constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it. *Apsden v. Austin*, 5 A. & E. N. S. 671; *Dunn v. Sayles*, Id. 685; *Coffin v. Landis*, 10 Wright, 426. Were it not so, the expectation of results would be always equivalent to a binding engagement that they should follow. But the obligation of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted. *Davies*, 28; *Barrington v. Potter*, Dyer, 81, b. fol. 67; *Faw v. Marsteller*, 2 Cranch, 29. No one ever doubted that a debt of one thousand dollars, contracted before 1834, could be paid by one hundred eagles coined after that year, though they con-

tained no more gold than ninety-four eagles such as were coined when the contract was made; and this, not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834, were not money until they were authorized by law; and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money simply is necessarily subject to the constitutional power of the government over the currency, whatever that power may be; and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation impaired, by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made, and the covenant undertaken, in subordination to the paramount right of the government. *Dobbins v. Brown*, 2 Jones [Pa.] 75; *Workman v. Mifflin*, 6 Casey, 362. We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the Legal Tender Acts impaired the obligation of contracts." *The Legal Tender Cases*, 12 Wallace, 547.

LECTURE LIX.

The Legal Tender Acts reconsidered, and their Validity affirmed by a divided Court. — The Constitution should be liberally construed in view of its object, which is Government. — It speaks in General Terms, and enumerates without defining. — How the Power to make all necessary and proper Laws should be Interpreted. — The necessity need not be Absolute, and all means which are plainly adapted to the end, and consistent with the Letter and Spirit of the Constitution are Valid. — The right to issue Bills of Credit in the form of Greenbacks recognized by the Minority as well as the Majority of the Court; and making them a Legal Tender is a necessary and proper means of giving them Currency. — A Judgment of the Supreme Court is not necessarily conclusive of the Principle. — Powers resulting from their relation to the Objects of the enumerated Powers. — The Right to Govern Territory acquired by Treaty or Conquest falls under this Head. — The Power to declare Paper Money a Legal Tender may be exercised during Peace. — “Supreme,” as applied to the Powers of the United States, synonymous with “Sovereign.”

IN the year 1870 the Legal Tender Acts were reconsidered by the Supreme Court. One of the judges had resigned during the interval, and two having been appointed, *Hepburn v. Griswold* was overruled by a majority of five to four. The Chief-Justice naturally held fast to the views which he had expressed on the former occasion, and the opinion of the court was delivered by Mr. Justice Strong in a judgment of great ability, and substantially the same as that which he had given some years previously while sitting in the Supreme Court of Pennsylvania. It is too full of matter for abbreviation, and should be read at length. Though having the judgment in *McCulloch v. Maryland* as its corner-stone, it amplifies as well as applies the doctrine of the great Chief-Justice, and cannot be omitted from a work which aims at

giving an account of the government of the United States as developed by the force of circumstances, the acts of Congress, and the decisions of the tribunal which has been at once the nurse and guardian of the Constitution. It would be rash to affirm that there will be no aftergrowth, but the powers of Congress came so near maturity in the Legal Tender Cases that carrying them farther would endanger the local self-government which is as essential to the permanence of the Union as the supremacy of Congress. The principal heads are contained in the following extracts, and may give an adequate idea of the conclusions reached by the majority of the court, and the reasons on which they were based : —

“ For weighty reasons it has been assumed as a principle, in construing constitutions, by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. And in *Fletcher v. Peck*,¹ Chief-Justice Marshall said : ‘ It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.’ It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt. Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose, and so as to subserve it. In no other way can the intent of the framers of the instrument be discovered. And there are more

¹ 6 Cranch, 87.

urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In *Martin v. Hunter*¹ it was said: 'The Constitution unavoidably deals in general language. It did not suit the purpose of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution.' And with singular clearness was it said by Chief-Justice Marshall, in *McCulloch v. The State of Maryland*:² 'A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.' If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object; but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy. The same may be asserted also of all the non-enumerated powers included in the authority expressly given 'to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government

¹ 1 Wheaton, 326.

² 4 Id. 405.

of the United States, or in any department or officer thereof.' It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. Said Chief-Justice Marshall, in *Cohens v. The Bank of Virginia*:¹ 'America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete, for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory.' He added, in the same case: 'A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests; and its framers must be unwise statesmen, indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter.' That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it the right to employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its First Article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things, enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof. And here it is to be observed, it is not indispensable to the existence of any power claimed for the federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from

¹ 6 Wheaton, 414.

more than one of the substantive powers expressly defined, or from them all combined. It is allowable to grant any number of them, and infer from all of them that the power has been conferred. . . .

"Congress has often exercised, without question, powers that are not expressly given, nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story, in his Commentaries on the Constitution, 'resulting powers,' arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one; so is building a capitol, or a presidential mansion; and so also is the penal code. . . .

"It was, however, in *McCulloch v. Maryland* that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. We shall not now go over the ground there trodden. It is familiar to the legal profession, and, indeed, to the whole country. Suffice it to say, in that case it was finally settled that in the gift by the Constitution to Congress of authority to enact laws 'necessary and proper' for the execution of all the powers created by it, the necessity spoken of is not to be understood as an absolute one. On the contrary, this court then held that the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Said Chief-Justice Marshall, in delivering the opinion of the court: 'Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.' The case also marks out with admirable precision the province of this court. It declares that 'when the law (enacted by Congress) is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court (it was said) disclaims all pretensions to such a power.' . . .

“With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the Legal Tender Acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited.

“This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly, to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times. We do not propose to dilate at length upon the circumstances in which the country was placed when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government, and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the war and navy departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions,

was insufficient to supply the need of the government three months had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business generally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

"It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the Legal Tender Acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the Legal Tender Acts would, could any one be bold enough to assert that Congress transgressed its powers? Or, if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or 'appropriate and adapted to that end,' in the language of Chief-Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation; and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

"If, however, it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued, and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that Congress had the choice of means for a legitimate end, each appropriate and adapted to that end, though perhaps in different degrees. What then? Can this court say that it ought to have adopted one rather

than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution. Said Chief-Justice Marshall, in *McCulloch v. Maryland*, as already stated: 'When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.'"¹

The Chief-Justice dissented on grounds which are substantially as follows: "There is no connection between the express power to coin money and the inference that the government can in any contingency make its securities perform the functions of a legal tender in payment of debts." The power to exclude notes not authorized by Congress may, perhaps, be deduced from the power to regulate coin. But the power to emit bills of credit is an exercise of the power to borrow money, and power over the currency is incidental to that power and the power to regulate commerce. Such was the doctrine of *The Veazie Bank v. Fenno*,² and it went no further. The Chief-Justice then asked, "Is the power to make the notes or bills of credit issued by the government a legal tender an appropriate, plainly-adapted means to a legitimate and constitutional end? Or, to state the question as formulated by the minority in *Hepburn v. Griswold*, 'does there exist any power in Congress or the government, by express grant, in the execution of which the Legal Tender Act is necessary and proper, in the sense above defined, under the circumstances of its passage?'" In his opinion, "the issuing of the circulation commonly known as 'greenbacks' was necessary and constitutional. They were necessary to the payment of the army and navy, and to all the purposes for which the government uses money. The banks had suspended specie payments, and the government was reduced to

¹ Legal Tender Cases, 12 Wallace, 457.

² 8 Wallace, 548.

the alternative of using their paper or issuing its own." This did not touch the real issue, which depended on whether "the making them a legal tender was a necessary means to the execution of the power to borrow money." If the notes would circulate as well without that quality, it was idle to urge necessity as a justification. The Chief-Justice then assigned various reasons for holding that notes of the United States would have answered the purposes of money, and been as efficient for carrying on the war, though creditors had not been compelled to accept them in payment. If such a currency was not in excess, it would maintain its level, and would be accepted everywhere as money. If it was not, no governmental fiat could prevent depreciation. He had, indeed, when Secretary of the Treasury, answered the inquiry of the Committee of Ways and Means, was it necessary to make the United States notes a legal tender, affirmatively. He was now satisfied that this opinion was erroneous, and did not hesitate to say so.

Space is wanting to trace the argument further; but I may say that it turned throughout on considerations which can have but a secondary importance in a legal tribunal. It is no doubt true that if the monetary units, whether in the form of coin or paper, are increased in number they will depreciate in value, and that on the completion of the process the purchasing power of the circulation will be the same as it was previously; but although the quality of legal tender cannot obviate the injurious consequences of an overissue, it may give the same market value to things which are intrinsically different. That such may be the effect has been demonstrated in the United States, where a lawful silver dollar will purchase more than the trade dollar, and as much as a gold dollar, although it contains less silver than the one, and is worth much less than the other, simply because Congress have made the lawful dollar a monetary unit and compulsorily current. Whether a similar result would follow from making the United States notes a legal tender was a political question, and when decided by Congress could not be reconsidered by the judiciary. Some political economists would, no

doubt, be of opinion, with the majority of the court in *Hepburn v. Griswold*, that the act of 1863 was not a necessary means of tiding over the war, and others think differently; but the decision belonged constitutionally to the assembly which had to provide the ways and means of subduing the insurrection. It does not seem to have occurred to the Chief-Justice that the conclusion which he formed as a statesman as to the measures to be adopted in view of the emergency may have been practically nearer the truth than his second thought when speaking from the bench. Weighing the reasons which he assigned for distrusting his original opinion against those given by Mr. Justice Strong for regarding it as sound, most persons will, perhaps, think that his first impression was correct. Whether such was or was not its character when regarded in the light of subsequent events, it was the sincere judgment of an able man, charged with the responsibility of administering the finances, and actuated by a sincere desire to serve his country. If he had reasonable grounds for recommending the measure, and the House of Representatives concurred with him, it was their duty to follow his advice. Such a moral obligation is the necessity which the Constitution contemplates and requires, and where it exists the act is not less valid because it subsequently appears that a different course might have been adopted with a not less favorable result.¹

¹ The Legal Tender Cases, 12 Wallace, 457, 541. See *ante*, p. 103; Hamilton's Works, vol. iii. 186.

"It is objected that none but necessary and proper means are to be employed, and the Secretary of State maintains that no means are to be considered necessary but those without which the grant of the powers would be nugatory. . . . It is essential to the being of the national government that so erroneous a conception of the meaning of the word 'necessary' should be exploded. It is certain that neither the grammatical nor the popular sense of the term requires that construction. According to both, 'necessary' often means no more than needful, requisite, incidental, or conducive to. It is a common mode of expression to say that it was necessary for a government or a person to do this or that thing, when nothing more is intended or understood than that interests of the government or persons require, or may be promoted by

Why so much stress was laid in *Hepburn v. Griswold* on whether the Legal Tender Act was "necessary," and so little on whether it was "proper," can be readily understood. No one, I believe, contends that in establishing a currency the legislature may not appropriately, as they do customarily, regulate its value,—that is, the rate at which it shall be taken in payment. Had not the framers of the Constitution been of this opinion they would not, in giving the power to coin, have added "and declare the value thereof." If this is true of gold and silver, which may pass current from their intrinsic value, it applies with more force where paper money is issued during a political and financial crisis, and is regarded with distrust in some quarters, with hostility in others. Such a currency depends on the confidence of the community, or on positive law; that is, creditors must be willing or compellable to receive it in payment. It is not

the doing of, this or that thing. The imagination can be at no loss for exemplifications on the use of the word in this sense. And it is the true one, in which it is to be understood as used in the Constitution. The whole turn of the clause indicates that it was the intent of the convention by that clause to give a liberal latitude to the exercise of the specified powers. The expressions have peculiar comprehensiveness. They are to make all laws necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof.

"To understand the word as the Secretary of State does would be to depart from its obvious and popular sense, and to give it a restrictive operation,—an idea never before entertained. It would be to give it the same force as if the word 'absolutely' or 'indispensably' had been prefixed to it.

"Such a construction would beget endless uncertainty and embarrassment. The cases must be palpable and extreme in which it could be pronounced with certainty that a measure was absolutely necessary, or one without which the exercise of a given power would be nugatory. There are few measures of any government which would stand so severe a test. To insist upon it would be to make the criterion of the exercise of any implied power a case of extreme necessity, which is rather a rule to justify the overleaping of the bounds of constitutional authority than to govern the ordinary exercise of it." *Opinion on the Constitutionality of the United States Bank*, Hamilton's Works, vol. iii. pp. 186, 187.

enough to print the notes and call them dollars ; they must be declared a legal tender, so that every man who takes them may be sure that they cannot be refused by others, and will enable him to pay what he owes. If bills of credit are thrown on the market without taking this precaution, and great banking companies and well-known financiers refuse to receive them on deposit or in payment, the example may be followed, and the credit of the government seriously impaired. Such a result might well have been apprehended in the United States during the Civil War. The new financial system was opposed by many persons on principle, by others from disaffection to the government. The notes of the United States became so much discredited that the banks of the leading commercial cities received them only as a special deposit and not as money of account ; a national bankruptcy seemed close at hand, and, in the opinion of most persons who were qualified to judge, would have ensued had not Congress, acting on the recommendation of the Secretary of the Treasury, rendered it the interest of creditors to accept what no debtor could legally refuse.¹

If it cannot be denied in view of these considerations that making the circulating medium, whether coin or paper, a legal tender is an appropriate means of causing it to pass readily from hand to hand, and may be necessary for that end, the question whether such a measure should be adopted in a particular instance is a political question, and exclusively for the legislature. The real issue, could the United States issue paper money and suppress the State bank-notes, was decided in favor of the government in *The Veazie Bank v. Fenno* ; and in adhering to that judgment the Chief-Justice would seem virtually to have given up the case. The veritable turning-point was clearly perceived by an able jurist, who, in writing on the same side, took the consistent, if not tenable, position that Congress have no power whatever to create a paper currency.² His reasons, as assigned in *Borie*

¹ See *Twenty Years in Congress*, by James G. Blaine, vol. i. p. 410.

² It has been argued that under this clause, " to borrow money on the credit of the United States " (Art. I., sect. viii., par. 2), Congress may

v. Trott,¹ were that the coinage power is confined to metals, and operates as an implied restriction on the use of other

issue these "United States notes," because they are only acknowledgments of debt in a negotiable form, and in order to give them greater credit make them a legal tender. That there may be constitutionally issued to the public creditor certificates of the amount due, transferable by assignment, or bonds or notes payable to the bearer, which can pass from hand to hand by mere delivery, I do not deny. These are all securities, and Congress are vested expressly with power "to provide for the punishment of counterfeiting the securities and current coin of the United States" (Art. I., sect. viii., par. 6). This language is accurate. Securities, *ex vi termini*, are something different from money. This view is strengthened when we find the coin described in the same paragraph as current coin.

The United States notes are not securities for money which may be issued under the authority to borrow; but they are "bills of credit," — things distinct and different from securities. That there is such a distinction may be clearly shown by the judgments of the highest tribunal, which gives the law on these subjects to all other courts. According to that tribunal, bills of credit are not certificates of loan, not treasury bonds or notes, not acknowledgments of indebtedness, — all of which are mere securities, — but bills invested with the functions of money, just such bills as the United States notes issued in pursuance of the act of Congress in question. In *Craig v. The State of Missouri* (4 Peters, 431), Chief-Justice Marshall, in delivering the opinion of the court, says: "In its enlarged and, perhaps, literal sense, the term 'bill of credit' may comprehend any instrument by which a State engages to pay money at a future day, — thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the term. The word 'emit' is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes in common language denominated 'bills of credit.' To 'emit bills of credit' conveys to the mind the idea of issuing paper intended to circulate through the community for its ordinary purposes as money, which paper is redeemable at a future day. This is the sense in which the terms have always been understood." The definition here given was subsequently reconsidered and sustained in *Briscoe v. The Bank of Kentucky* (8 Peters, 118). According to this clear and authoritative exposition, what distinguishes bills of credit from

¹ 5 Philad. 306.

materials; and that in striking out the words "to emit bills of credit" from the clause conferring the power to borrow,

such securities as are issued to the public creditor is that the former are, and the latter are not, intended to circulate as money. These United States notes, then, are not acknowledgments of debt, nor "securities of the United States," but "bills of credit,"—in other words, "money." Indeed, this act of Congress of Feb. 25, 1862, intends to leave no doubt on that point, for it expressly declares that they shall be "lawful money." In conformity, then, to the principle, as settled by the Supreme Court in *McCulloch v. The State of Maryland*, we must turn to the money clause to ascertain whether Congress had authority to make them "lawful money." That body cannot, as incidental to the power to borrow, create any kind of money which will not stand the test of the express power which is granted on that subject.

If any doubt remains as to whether the right to emit bills of credit—to make paper money—can be exercised as incidental to the borrowing power, it ought, as it appears to me, to be entirely dissipated by the proceedings of the Federal Convention when this clause was before them. I freely admit that the opinions expressed in that body are not conclusive upon the interpretation of the Constitution. That instrument is to be construed like all others, by its four corners. But surely, as Chief-Justice Marshall relied "on the history of our country" in limiting the meaning of the words "bills of credit," we may resort for light to the opinions and votes of the men who framed the Constitution, in deciding whether in the words "to borrow money" was intended to be included "to emit bills of credit;" for that is the precise question we have here to consider. By the ninth of the old Articles of Confederation, section 5, it was declared that "the United States, in Congress assembled, shall have authority to borrow money or emit bills on the credit of the United States." In the plan of the Constitution, as reported to the convention by the Committee of Detail, of which Mr. Rutledge was chairman, this clause was copied,— "to borrow money and emit bills on the credit of the United States." On the 17th of August, 1787, in convention, Mr. Gouverneur Morris, of Pennsylvania, moved to strike out the words "and emit bills." There was a debate on this motion, which is reported by Mr. Madison. It was argued by some—and Mr. Madison himself among the number—that the words had better remain, with a provision prohibiting them from being made a legal tender. Mr. James Wilson, of Pennsylvania, afterwards one of the Justices of the Supreme Court of the United States, appointed by President Washington, contended that it would have a most salutary influence on the credit of the United States "to remove the possibility of paper money." Other members who spoke concurred with him in this view. The motion was carried, and the words stricken out by a vote of nine States to two. Mr. Madison has added in,

the convention showed that they did not mean to sanction or allow their use.¹ The argument has been noticed elsewhere, but I may observe that the effect of striking out a clause is simply to leave the instrument as it would have stood had the clause not been introduced. If omission were equivalent to prohibition, there would be an end to the doctrine of implied powers, contrary to the manifest intent of the Article I., section vii., subdivision 19.

In *The Legal Tender Cases*² the Chief-Justice spoke somewhat bitterly of the reversal of the judgment in *Hepburn v. Griswold*. Five judges had by a majority of one set aside a decision which had been made by five with only three dis-

a foot-note, that the vote by Virginia in the affirmative was occasioned by his acquiescence, because he became satisfied that striking out the words would not disable the government from the use of public notes, as far as they could be safe and proper, and would only cut off the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts (5 Elliott's Debates, 434, 435). I do not know how these proceedings may strike other minds, but they have convinced me that the Federal Convention understood by "bills of credit," not securities, — certificates of loan or indebtedness, treasury notes, or exchequer bills, — but just what Chief-Justice Marshall afterwards defined them to be, "paper money," and meant to deny to Congress the power to make such money.

¹ Luther Martin, in his address to the Maryland Legislature in justification of his course in retiring from the Federal Convention, has also given a brief sketch of this interesting debate, which corresponds in the main with that of Mr. Madison. He declares in the most emphatic manner that "a majority of the convention, being willing to risk any political evil rather than admit the idea of a paper emission in any possible case, refused to trust this authority to the government" (Secret Proceedings of the Federal Convention, p. 57). He afterwards informs the legislature, as indicative of the temper of the body from which he had withdrawn, that as the Constitution "was reported by the Committee of Detail, the States were only prohibited from emitting them (bills of credit) without the consent of Congress; but the convention were so smitten with the paper-money dread that they insisted that the prohibition should be absolute. It was my opinion, sir," he proceeds to say, "that the States ought not to be totally deprived of the right to emit bills of credit, and that, as we had not given an authority to the General Government for that purpose, it was the more necessary to retain it in the States."

² 12 Wallace, 457, 572.

sentient voices, at a time when they were not on the bench. Such a course was unprecedented in the history of the court, and could produce no change in the opinion of those by whom the former judgment was rendered. It was, however, not so entirely without precedent as he seems to have supposed. Another and noteworthy instance may be found in the case which made the name of Dred Scott historical. The act of 1820, known as the Missouri Compromise, excluding slavery north of latitude 36° 30' from the territory acquired from France by the Louisiana purchase, was passed in a spirit of conciliation to adjust the issue between North and South, and apportion the national domain fairly between both sections.¹ Generally regarded as a buttress of the Union, it stood until 1857, when it was declared unconstitutional by all the judges of the Supreme Court except Curtis and McLean. As Mr. Blaine observes, in his historical summary of the period, "This decision was at war with the practice and traditions of the government, and set aside the matured conviction of two generations of conservative statesmen."² Accepted by one party and decried by the other, it became obsolete through the issue of the struggle which it tended to provoke, and was silently overruled.

The Dred Scott Case has not been cited or relied on since the Civil War, and no one now contends that Congress have not the police power in the Territories, which is withheld from them in the States.³ It cannot be maintained, in view of this change of opinion in the community and on the bench, that the Supreme Court can never err, or that its mistakes may not be corrected. What may justly be remarked is that, numerous, intricate, and important as are the questions submitted to the tribunal of last resort, it has in the main adhered to the key-note struck by the hand of Chief-Justice Marshall, and has seldom had occasion to retrace its steps. That this can be said in a democratic country, after the lapse of a hundred years, and notwithstanding the heat and clamor

¹ See *Twenty Years in Congress*, by James G. Blaine, vol. i. p. 170.

² *Twenty Years in Congress*, by James G. Blaine, vol. i. p. 164.

³ See *ante*, p. 1146.

of party strife, is creditable alike to the judiciary and the people.

It was contended by counsel in the cases above referred to, and held by Chief-Justice Chase, that in the absence of the authority which is expressly conferred in the case of specie, a law rendering paper money a legal tender cannot be necessary and proper, in the sense of the constitutional requirement, because it simply helps to render the government stronger and more efficient; and if it bears any relation to the enumerated powers, is as appropriate and as plainly adapted to each and all of them as to any one.¹ The argument can hardly be deemed conclusive, and may be thought to point in the opposite direction, because a necessity springing from several duties is more peremptory than if it arose from one. A remedy which invigorates the whole body may be specifically adapted to a particular ailment; and money is not less the nerve of war because it is needful for the other functions of government. Congress cannot make laws simply to provide for the common defence and general welfare;² but a law may be a necessary and proper means of executing an express power, although it bears the same relations to other powers, and tends to strengthen the government as a whole.

As Mr. Justice Strong observed, in the opinion already cited, the Constitution should, like other instruments, be construed as a whole, and each clause read in the light of every other. And it was said to follow that any number of the enumerated powers might be grouped, and the existence of an unenumerated power inferred from all of them. It is not easy, however, to discern how an authority can be deduced from a group of powers, unless it is an appropriate means of executing some one of them. If such be the case it undeniably exists, and there is no need of grouping. There are nevertheless certain powers which, though not ordinarily essential to the exercise of the enumerated powers, are so closely related to one or more of them, or of the ends for

¹ Legal Tender Cases, 12 Wallace, 457, 484.

² See *ante*, p. 242.

which they were conferred, that they must be presumed to have been contemplated by the framers of the government, and were significantly termed by Hamilton "resulting powers."

Where an enumerated power will, if exercised, have certain consequences, the intention presumably is that the measures which are requisite to render them conducive to the public good shall also be admissible. Under these circumstances the implied power is not essential to the execution of the express power, but is essential to the use or enjoyment of the object of the express power, and therefore as much a part of it as if it were set forth in terms. The enactment of laws, the administration of justice, the laying and the assessment of taxes, are ordinarily foreign to the power to wage war, and certainly do not fall within the scope of the executive department of the government; but when war results in the conquest and occupation of the hostile territory, it may be necessary for the President, or the generals under his command, to make such rules as are requisite to maintain order and suppress crime, and enforce them by establishing courts, and even to make war feed war by levying dues and customs, and paying the proceeds into the military chest.¹ So from the treaty-making power springs an authority to acquire territory by cession, which in its turn implies a right to use all the powers incident to sovereignty, for the purpose of ruling the province so obtained, and preventing the anarchy that would otherwise ensue.² The primary object of the

¹ See *ante*, pp. 945, 948; Hamilton's Works, vol. iii. p. 181.

² See *The Legal Tender Cases*, 12 Wallace, 457.

Such was the decision of the Supreme Court in the *Dred Scott* case, 19 Howard, 303, 403. *ante*, p. 1146, which would seem to be just as regards the origin of the power, and the language of Hamilton points in the same direction: "It is not denied that there are implied as well as express powers, and that the former are as effectually delegated as the latter. And for the sake of accuracy it shall be mentioned that there is another class of powers, which may properly be denominated 'resulting powers.' It will not be doubted that if the United States should make a conquest of any of the territories of its neighbors they would possess sovereign jurisdiction over the conquered territory. This would be rather

cession of territory by one independent state to another is the transfer of sovereignty; and it is the right and duty of the new sovereign to exercise the power so conferred. The statesmen who framed the Constitution might have withheld the power to enlarge the bounds of the United States by conquest and negotiation, but certainly did not mean in granting it to deny the right to govern, which, where a nation is concerned, results from the right to acquire. Agreeably to the weight of authority the power of the government in this regard results from the above considerations, and not from the clause authorizing Congress to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, which confer the right of property rather than of Government.¹

We have here a power which, though springing from the enumerated powers, extends beyond their limits, and includes much — as, for instance, the police power — which they do not generally imply. As Chief-Justice Marshall observed, in legislating for the Territories “Congress exercise the combined powers of the States and the General Government;” and they may, consequently, make whatever laws are requisite for the promotion of health, order, and morals.² So much was admitted by the majority in the *Dred Scott* Case; but it was contended that as the area acquired from France was held in trust for the people of the United States, and the Constitution recognized the right of property in slaves, the exercise of that right could not be forbidden in any portion of the national domain, however injurious it might be to the inhabitants, or prejudicial to the nation as a whole.³ Such an argument is sufficiently refuted by the decisions which establish that the privileges conferred by a

a result from the whole mass of the powers of the government, and from the nature of the political society, than a consequence of either of the powers specially enumerated.” *Hamilton's Works*, vol. iii. p. 184.

¹ See *ante*, p. 1116.

² See *ante*, p. 1146; *The American Insurance Co. v. Canter*, 1 Peters, 511; *Dred Scott Case*, 19 Howard, 393, 442, 541.

³ 19 Howard, 393, 451.

legislative grant or charter, and the rights of property acquired through them, will not be allowed to stand in the way of enactments for the suppression of a manufacture or traffic which is hurtful to the community.¹ Congress could not, by virtue of the police power, or any other known to the Constitution, have emancipated a single slave; but they might well forbid the importation of slaves into a section where their presence would lower the dignity of labor, and hinder the immigration of the yeomen who are the mainstay of the republic.

I have dwelt thus long on the controversy which was adjusted by the Missouri Compromise, reopened by the Supreme Court, and closed by the Civil War, because it shows how unforeseen and far-reaching are the consequences that may flow from the grant of sovereignty for the purposes of government, even when, as in the case of the United States, it is jealously confined to certain objects, and fails where these are not concerned. I may add that the right of the inhabitants of the United States to have a free access to the capital, or any quarter of the country which it may be incumbent on them to visit in the performance of their obligation as citizens or subjects, results from the relation of the government to the people as defined in the Constitution as a whole, rather than from any specific clause.²

There is this inconvenience in deducing the right to issue paper money from the power to declare war, that, if there be no other ground, it must fail on the return of peace.³ The notes which have been issued during the war may continue to be a legal tender notwithstanding the cessation of hostilities, but they cannot be reissued after they have been redeemed, nor can new notes be emitted in their place. The question arose under an act of May 31, 1870, ch. 146, providing that "whenever United States notes are redeemed, or come into the treasury from any source, they shall not be

¹ See *ante*, pp. 608-614, 773.

² *Crandall v. Nevada*, 6 Wallace, 85. See *ante*, p. 475.

³ See *Juillard v. Greenman*, reported as the *Legal Tender Case*, 110 U. S. 421, 432.

retained or cancelled, but shall be reissued and kept in circulation." It was ably contended for the plaintiff in error that the tender made by the defendant in notes which had been reissued under this act was invalid. The Civil War had since passed into history, and there was no longer any justification for the abnormal powers which had been exercised during its continuance. In determining whether an act of Congress is necessary and proper, regard must be had to the state of things at the time when it was passed. The existence of a great public exigency was the only ground on which the power to make paper a legal tender can successfully be maintained. When jurisdiction, whether of a court or the legislature, depends on a given state of facts, and these do not exist, the acts done in pursuance of it are void. With an overflowing treasury, and abundant means to pay off the existing loans faster than they matured, it could not be pretended that the United States notes were reissued with a view to borrowing, or essential to that end.

The court held that aside from the exigency of war there was a sufficient basis for the right in question in the power to borrow and the duty to create a currency in which the functions of the government could be carried on. Under the former head Congress might not only give notes or bonds for the amount lent, but make them payable to bearer and receivable for all debts due the government. So much was maintained or admitted by all the judges in the Legal Tender Cases, and must be regarded as no longer open to dispute. The constitutional obligation to provide a currency for the whole country was equally unquestionable, and might be carried into effect by making the bills of credit issued for borrowed money a legal tender. The right to create paper money by such means was everywhere regarded as incident to sovereignty when the Constitution was framed and adopted, and not being forbidden was impliedly contained in the power to borrow.

It is not easy to discern which of the various powers referred to in the course of this opinion were mainly relied on in reaching the conclusion; but the argument succinctly

stated appears to be that since it is the right and duty of Congress to create a currency, in view of the numerous functions which cannot be fulfilled without such aid, the bills of credit emitted under the power to contract loans, may be converted into lawful money by rendering them a legal tender by virtue of the sovereignty which belongs to the United States within the scope of the enumerated powers as fully as to any government on earth.¹ So read, the judgment avoids the alarming proposition that Congress may levy forced loans, and rests on the implied right to create the currency, which is as essential to the functions of the government as the circulation of the blood is to the human frame. As counsel justly observed in arguing against the validity of the Legal Tender Acts, "the government of the United States has no inherent sovereignty, but only such sovereign powers as are delegated to it by a written Constitution, which carefully and expressly declared that all powers not conferred by that instrument were reserved to the State and the people."² But it is also true that the powers so delegated are sovereign within their scope, and imply the right to use every means that is incident to sovereignty, and proper for carrying it into effect. This is not merely inferential. "Sovereignty" is simply an expressive term for "supreme;" and it is expressly declared that "the Constitution of the United States, the laws made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States," shall be the supreme law of the land. "The power which can create the supreme law of the land in any case is doubtless sovereign as to such case."³

¹ See *ante*, p. 95.

² *Juillard v. Greenman*, 110 U. S. 421, 435.

³ *Hamilton's Works*, vol. iii. p. 182. New York and London, 1885.

"It appears to the Secretary of the Treasury that this general principle is inherent in the very definition of government, and essential to every step of the progress to be made by that of the United States, viz., that every power vested in a government is in its nature sovereign, and includes, by force of the term, a right to employ all the means requisite and fairly applicable to the attainment of the ends of such power which are not precluded by restrictions and exceptions specified in the Constitu-

tion, or not immoral, or not contrary to the essential of political society. This principle, in its application to government in general, would be admitted as an axiom; and it will be incumbent upon those who may incline to deny it to prove a distinction, and to show that a rule which, in the general system of things, is essential to the preservation of the social order is inapplicable to the United States. The circumstances that the powers of sovereignty are in this country divided between the national and State governments does not afford the distinction required. It does not follow from this that each of the portion of powers delegated to the one or the other is not sovereign with regard to its proper objects. It will only follow from it that each has sovereign power as to certain things, and not as to other things. To deny that the government of the United States has sovereign power as to its declared purposes and trusts, because its power does not extend to all cases, would be equally to deny that the State governments have sovereign power in any case because their power does not extend to every case. The tenth section of the First Article of the Constitution exhibits a long list of very important things which they may not do. And thus the United States would furnish the singular spectacle of a political society without sovereignty, or of a people governed without government. If it would be necessary to bring proof of a proposition so clear as that which affirms that the powers of the federal government as to its objects were sovereign, there is a clause of its Constitution which would be decisive. It is that which declares that the Constitution and the laws of the United States made in pursuance of it, and all treaties made or which shall be made under their authority, shall be the supreme law of the land. The power which can create the 'supreme law of the land' in any case, is doubtless sovereign as to such case." Opinion as to the Constitutionality of the Bank of the United States, Hamilton's Works, vol. iii. p. 183.

ARTICLES OF CONFEDERATION

AND perpetual union between the states of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

ARTICLE I. The style of this Confederacy shall be, “THE UNITED STATES OF AMERICA.”

ARTICLE II. Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States in Congress assembled.

ARTICLE III. The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state; and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided, that such restriction shall not extend so far as to prevent the removal of property imported into any state to any other state, of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any state on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor, in any state, shall flee from justice, and be found in any of the United States, he shall, upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offence.

Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.

ARTICLE V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each state shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each state to recall its delegates, or any of them, at any time within the year, and send others in their stead for the remainder of the year.

No state shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years, in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit, receives any salary, fees, or emolument of any kind.

Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states.

In determining questions in the United States in Congress assembled, each state shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; and the members of Congress shall be protected in their persons from arrests and imprisonment during the time of their going to, and from, and attending on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No state, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person, holding any office of profit or trust under the United States, or any

of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No state shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States in Congress assembled with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the Courts of France and Spain.

No vessels of war shall be kept up, in time of peace, by any state, except such number only as shall be deemed necessary, by the United States in Congress assembled, for the defence of such state or its trade; nor shall any body of forces be kept up by any state, in time of peace, except such number only as, in the judgment of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such state: but every state shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutred; and shall provide and constantly have ready for use, in public stores, a due number of field-pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No state shall engage in any war, without the consent of the United States in Congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any state grant commissions to any ship or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled; and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled,

unless such state be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land forces are raised by any state for the common defence, all officers of or under the rank of colonel shall be appointed by the legislature of each state respectively, by whom such forces shall be raised, or in such manner as such state shall direct; and all vacancies shall be filled up by the state which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury which shall be supplied by the several states in proportion to the value of all land within each state, granted to or surveyed for any person as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall, from time to time, direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states, within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article: Of sending and receiving ambassadors: Entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective states shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatever: Of establishing rules for deciding, in all cases, what captures on land or water shall be legal; and in what manner prizes, taken by land or naval forces in the service of the United States, shall be divided or appropriated: Of granting letters of marque and reprisal in times of peace: Appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining, finally, appeals in all cases of captures;

provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort, on appeal, in all disputes and differences now subsisting, or that hereafter may arise between two or more states concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any state, in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other state in controversy; and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States; and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges, who shall hear the cause, shall agree in the determination. And if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each state, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed in the manner before prescribed, shall be final and conclusive. And if any of the parties shall refuse to submit to the authority of such court, or to appear, or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being, in either case, transmitted to Congress and lodged among the Acts of Congress

for the security of the parties concerned: Provided that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the state where the cause shall be tried, "Well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward:" Provided also, that no state shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more states, whose jurisdictions, as they may respect such lands and the states which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different states.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective states: Fixing the standard of weights and measures throughout the United States: Regulating the trade and managing all affairs with the Indians, not members of any of the states; provided that the legislative right of any state within its own limits be not infringed or violated: Establishing and regulating post-offices, from one state to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office: Appointing all officers of the land forces in the service of the United States, excepting regimental officers: Appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States: Making rules for the government and regulation of the land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated A COMMITTEE OF THE STATES, and to consist of one delegate from each state, and to appoint such other committees and

civil officers as may be necessary for managing the general affairs of the United States under their direction : To appoint one of their number to preside ; provided that no person be allowed to serve in the office of president more than one year in any term of three years : To ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses : To borrow money or emit bills on the credit of the United States, transmitting every half year to the respective states an account of the sums of money so borrowed or emitted : To build and equip a navy : To agree upon the number of land forces, and to make requisitions from each state for its quota, in proportion to the number of white inhabitants in such state, which requisition shall be binding ; and thereupon the legislature of each state shall appoint the regimental officers, raise the men, and clothe, arm, and equip them, in a soldierlike manner, at the expense of the United States ; and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled : but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any state should not raise men, or should raise a smaller number than its quota, and that any other state should raise a greater number of men than its quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such state ; unless the legislature of such state shall judge that such extra number cannot be safely spared out of the same ; in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared : and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States, in Congress assembled, shall never engage in a war ; nor grant letters of marque and reprisal in time of peace ; nor enter into any treaties or alliances ; nor coin money ; nor regulate the value thereof ; nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them ; nor emit bills ; nor borrow money on the credit of the United States ; nor appropriate money ; nor agree upon the num-

ber of vessels of war to be built or purchased, or the number of land or sea forces to be raised ; nor appoint a Commander-in-Chief of the army or navy ; unless nine states assent to the same ; nor shall a question on any other point, except for adjourning from day to day, be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months ; and shall publish the Journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations, as in their judgment require secrecy ; and the yeas and nays of the delegates of each state on any question shall be entered on the Journal, when it is desired by any delegate ; and the delegates of a state, or any of them, at his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states.

ARTICLE X. The committee of the states, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine states, shall from time to time think expedient to vest them with ; provided that no power be delegated to the said committee, for the exercise of which, by the Articles of Confederation, the voice of nine states in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada, acceding to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union ; but no other colony shall be admitted into the same, unless such admission be agreed to by nine states.

ARTICLE XII. All bills of credit emitted, moneys borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith, are hereby solemnly pledged.

ARTICLE XIII. Every state shall abide by the determinations of the United States in Congress assembled, on all questions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every state; and the Union shall be perpetual. Nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every state.

And whereas, it hath pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union: Know ye that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained. And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States in Congress assembled, on all questions, which by the said Confederation are submitted to them; and that the articles thereof shall be inviolably observed by the states we respectively represent; and that the Union shall be perpetual. In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia, in the state of Pennsylvania, the 9th day of July, in the year of our Lord 1778, and in the 3d year of the Independence of America.

CONSTITUTION OF THE UNITED STATES OF AMERICA.

[The numbers in brackets refer to the pages of this book.]

WE, the people of the United States [70, 74, 76, 86-93], in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America [100].

ARTICLE I

SECTION 1. — 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. — 1. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature [33-35, 520].

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons [249]. The actual enumeration shall

be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each state shall have at least one Representative; and, until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment [210, 855].

SECTION 3. — 1. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote [34, 76, 209, 520].

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year; so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The Vice-President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a President *pro tempore*, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present [210].

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4. — 1. The times, places, and manner, of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof: but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators [520].

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. — 1. Each House shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each House may provide [74].

2. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each House shall keep a journal of its proceedings, and, from time to time, publish the same, excepting such parts as may, in their judgment, require secrecy; and the yeas and nays of the members of either House, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days

nor to any other place than that in which the two Houses shall be sitting.

SECTION 6. — 1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective Houses, and in going to, and returning from, the same; and for any speech or debate in either House, they shall not be questioned in any other place [854].

2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time; and no person, holding any office under the United States, shall be a member of either House during his continuance in office.

SECTION 7. — 1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills.

2. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If, after such reconsideration, two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and, if approved by two-thirds of that House, it shall become a law. But in all such cases the votes of both Houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each House respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return, in which case it shall not be a law [211].

3. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment), shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be re-passed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

SECTION 8. — The Congress shall have power

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts. and provide for the common defence and general welfare, of the United States [94, 118, 241]; but all duties, imposts, and excises, shall be uniform throughout the United States [72, 133, 241, 277, 436]:

2. To borrow money on the credit of the United States [113, 267, 1295, 1308]:

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes [108, 109, 249, 251, 253, 274, 462, 470, 482, 503, 516, 1006, 1256]:

4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States:

5. To coin money, regulate the value thereof [113, 114, 1232], and of foreign coin, and fix the standard of weights and measures [1232]:

6. To provide for the punishment of counterfeiting the securities and current coin of the United States [117, 1122, 1124, 1133]:

7. To establish post-offices and post-roads [111, 116, 244, 248, 482]:

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries:

9. To constitute tribunals inferior to the Supreme Court:

10. To define and punish piracies and felonies, committed on the high seas, and offences against the law of nations [1122, 1132, 1135, 1140]:

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water [73, 905, 950-979]:

12. To raise and support armies ; but no appropriation of money to that use shall be for a longer term than two years [113, 905, 950]:

13. To provide and maintain a navy [905-950]:

14. To make rules for the government and regulation of the land and naval forces [905, 950-960, 965-979]:

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions:

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress:

17. To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places, purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings [1141-1146, 1305-1307]:

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof [102-534, 1148, 1291-1302].

SECTION 9.—1. The migration or importation of such persons, as any of the states, now existing, shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person [473].

2. The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it [97, 511, 893, 960-966].

3. No bill of attainder [511, 547, 549, 551-556], or *ex post facto* law, shall be passed [511, 544, 571-575, 737].

4. No capitation, or other direct tax, shall be laid, unless in proportion to the *census* or enumeration hereinbefore directed to be taken [249].

5. No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another ; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties, in another [97].

6. No money shall be drawn from the treasury, but in consequence of appropriations made by law ; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

7. No title of nobility shall be granted by the United States ; and no person, holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECTION 10. — 1. No state shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal [269, 1232–1249] ; coin money [113, 267, 511, 1232, 1249, 1299] ; emit bills of credit ; make anything but gold and silver coin a tender in payment of debts [311, 1132] ; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility [97, 216, 511, 572, 746].

2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States ; and all such laws shall be subject to the revision and control of the Congress. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

SECTION 1. — 1. The Executive power shall be vested in a President of the United States of America [170–173]. He shall hold his office during the term of four years, and together with the Vice-President, chosen for the same term, be elected as follows :

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives, to which the state may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit, under the United States, shall be appointed an Elector [219].

3. The Electors shall meet in their respective states, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed; and if there be more than one, who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose, by ballot, one of them for President; and if no person have a majority, then, from the five highest on the list, the said House shall, in like manner, choose the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.

4. The Congress may determine the time of choosing the Electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

5. No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office, who shall not have attained to the age of

thirty-five years, and been fourteen years a resident within the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

7. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive, within that period, any other emolument from the United States, or any of them.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation :

9. " I do solemnly swear (or affirm), that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

SECTION 2. — 1. The President shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States [73, 906-914, 972-979]; he may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices [175], and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur [15, 172-174, 439-502, 1305]; and he shall nominate, and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers, and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law : but the Congress may by law vest the

appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments [175].

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

SECTION 3. — 1. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States [96].

SECTION 4. — 1. The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors [210, 855].

ARTICLE III.

SECTION 1. — 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish [1167]. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

SECTION 2. — 1. The judicial power shall extend [988] to all cases, in law and equity, arising under this Constitution [28, 54, 119, 985, 992, 1002], the laws of the United States [985], and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls [985–1025]; to all cases of admiralty and maritime jurisdiction [985, 1003, 1023]; to controversies to which the United States

shall be a party [985, 1023-1025]; to controversies between two or more states [985-1024], between a state and citizens of another state [510, 888, 985, 1026-1041, 1065-1072], between citizens of different states [985, 1026, 1033], between citizens of the same state claiming lands under grants of different states [985], and between a state, or the citizens thereof, and foreign states, citizens, or subjects [985].

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction [992, 1025, 1167]. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make [720, 990-1044, 1162-1168].

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state the trial shall be at such place or places as the Congress may by law have directed [507, 963, 1120].

SECTION 3. — 1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court [1105-1122].

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted [1122].

ARTICLE IV.

SECTION 1. — 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

SECTION 2. — 1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states [276, 462, 480, 512, 515-516].

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

SECTION 3. — 1. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States [1142]; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

SECTION 4. — 1. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence [124].

ARTICLE V.

1. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress: provided that no amendment which may be made prior

to the year one thousand eight hundred and eight, shall, in any manner, affect the first and fourth clauses in the ninth section of the first Article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate [30, 138, 504].

ARTICLE VI.

1. All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution as under the Confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding [95-130].

3. The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States [75].

ARTICLE VII.

1. The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same [38, 46, 89].

AMENDMENTS TO THE CONSTITUTION.

[506, 508, 509, 1041.]

ARTICLE I.

Congress shall make no law respecting an establishment of religion [509, 555-556], or prohibiting the free exercise thereof; or abridging the freedom of speech [509, 539], or of the press; or the right of the people peaceably to assemble [509, 533-538], and to petition the government for a redress of grievances [509].

ARTICLE II.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed [509-521].

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, but in a manner to be prescribed by law [66, 509].

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized [509, 831-836, 960].

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury [507, 570, 931, 963, 1162], except in cases arising in the land

or naval forces, or in the militia, when in actual service, in time of war, or public danger [510, 931. 960-963] ; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb [510, 570] ; nor shall be compelled, in any criminal case, to be a witness against himself [510, 833-836], nor be deprived of life, liberty, or property, without due process of law [510, 706, 904, 1281] ; nor shall private property be taken for public use, without just compensation [301, 317, 331, 349, 385, 426, 510, 623, 829].

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ; and to be informed of the nature and cause of the accusation ; to be confronted with the witnesses against him ; to have compulsory process for obtaining witnesses in his favor ; and to have the assistance of counsel for his defence [507-510, 865, 960-964.].

ARTICLE VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved ; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law [510, 866].

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted [510].

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people [94, 510].

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people [94, 102, 510, 533].

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state [510, 1041, 1078].

ARTICLE XII.

1. The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign, and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such a majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a

President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in case of the death, or other constitutional disability, of the President [219].

2. The person having the greatest number of votes as Vice-President shall be the Vice-President, if such number be a majority of the whole number of Electors appointed; and if no person have a majority, then, from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators; a majority of the whole number shall be necessary to a choice.

3. But no person constitutionally ineligible to the office of President, shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

SECTION 1. — Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction [509-511, 536, 541-542].

SECTION 2. — Congress shall have power to enforce this article by appropriate legislation.

ARTICLE XIV.

SECTION 1. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside [517-519]. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States [216, 253, 512-516, 519, 526-540]; nor shall any state deprive any person of life, liberty, or property, without due process of law [511, 531, 534-537, 540, 706, 904], nor deny to any person within its jurisdiction the equal protection of the laws [511, 532-534, 540].

SECTION 2. — Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors

for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3. — No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

SECTION 4. — The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. — The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

SECTION 1. — The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude [511, 524-527, 540].

SECTION 2. — The Congress shall have power to enforce this article by appropriate legislation.

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